Supreme Court, U.S.
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APPENDIX

In the Supreme Court of the United States

~~OCTOBER~~ TERM, ~~1970~~ 1971

No. ~~1025~~ 70-45

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT FILED NOVEMBER 30, 1970
REVIEW GRANTED MARCH 1, 1971

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1205

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INDEX

	Page
Indictment (December 1, 1969)	1
Respondent's motion to dismiss the indictment under Art. I, Sec. 6 of the Constitution (July 31, 1970)	8
Respondent's motion to dismiss the indictment on other grounds (July 31, 1970)	9
Transcript of hearing on respondent's motion to dismiss the indictment and opinion of the district court (October 9, 1970)	10
Order of the district court granting the motion to dismiss the indictment (November 3, 1970)	34
The notice of appeal (November 6, 1970)	34
The order of this Court postponing consideration of the question of jurisdiction to the merits (March 1, 1971)	35

United States District Court for the District of Columbia

Holding a Criminal Term

Grand Jury Sworn in on April 1, 1969

Criminal No.

Grand Jury No. — Original

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER, CYRUS T. ANDERSON, SPIEGEL, INC.

Violation:

18 U.S.C. 201 (Bribery of Public Officials)
18 U.S.C. 2 (Aiding and Abetting)

The Grand Jury charges:

First Count:

(1) At all times hereinafter mentioned in this indictment, Daniel B. Brewster was a public official of the United States, that is, a member of the Senate of the United States from the State of Maryland.

(2) At all times hereinafter mentioned in this indictment, Daniel B. Brewster, in his capacity as a United States Senator, served as a member of the Committee on Post Office and Civil Service of the Senate of the United States.

(3) At all times hereinafter mentioned in this indictment, the Senate of the United States, pursuant to Standing Rule 25.1(n)(3), referred all proposed legislation relating to the postal service to the standing Committee on Post Office and Civil Service.

(4) During the First Session of the Ninetieth Congress, the Congress of the United States was considering legislation to adjust postage rates.

(5) At all times hereinafter mentioned in this indictment, Spiegel, Inc., a Delaware corporation, was engaged in the sale of merchandise, principally by mail and through catalogs.

(6) At all times hereinafter mentioned in this indictment, Cyrus T. Anderson was a lobbyist who was registered with the Secretary of the Senate and the Clerk of the United States House of Representatives and who represented Spiegel, Inc.

(7) On or about January 10, 1966, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity, that is, the "D.C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

Second Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them therein by reference.

(2) On or about January 10, 1966, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D.C. Committee for Maryland Education", with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

Third Count:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 16, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect of his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

Fourth Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 16, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

Fifth Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about April 27, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function; under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $4,500 for himself and for an entity, that is, the "D. C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity, and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

Sixth Count:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about April 27, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $4,500 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D. C. Committee for Maryland Education", with the intent to influence Daniel B. Brewster's action, vote and decision on postage rates legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

Seventh Count:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about July 19, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity, that is, the "D. C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

Eighth Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about July 19, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D. C. Committee for Maryland Education", with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official

capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

Ninth Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 31, 1968, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself, from Cyrus T. Anderson and Spiegel, Inc. for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(g) and 2, Title 18, United States Code.

Tenth Count:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 31, 1968, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, for and because of official acts performed by Daniel B. Brewster in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity

and in his place of trust and profit: in violation of Sections 201(f) and 2, Title 18, United States Code.

Attorney of the United States in and for the District of Columbia

A true bill:

Foreman.

[Filed, July 31, 1970, Robert M. Stearns, Clerk]

In the United States District Court
for the District of Columbia

Criminal No. 1872–69

UNITED STATES OF AMERICA
vs.
DANIEL B. BREWSTER, ET AL.

Motion by Defendant, Daniel B. Brewster, under Article 1, Section 6 of the United States Constitution to dismiss counts 1, 3, 5, 7 and 9 of the Indictment

The Defendant, Daniel B. Brewster, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, moves to dismiss Counts 1, 3, 5, 7 and 9 of the Indictment, and says:

1. Counts 1, 3, 5, and 7 of the Indictment charge this Defendant with violations of 18 U.S.C. § 201(c)(1), and in each such Count this Defendant is charged with being influenced in his performance of official acts in his capacity as a United States Senator.

2. Count 9 of the Indictment charges this Defendant with violation of 18 U.S.C. § 201(g) for receiving moneys for or because of official acts performed by him in his capacity as a United States Senator.

3. Each Count of the Indictment, as charged, against this Defendant violates the provision of Article 1, Section 6 of the United States Constitution.

WHEREFORE, this Court is respectfully requested to dismiss the Indictment as returned and filed against this Defendant.

NORMAN P. RAMSEY
THOMAS H. WADDEN
Attorneys for Defendant,
Daniel B. Brewster.

[Filed, July 31, 1970, Robert M. Stearns, Clerk]

United States District Court
for the District of Columbia

Criminal No. 1872–69

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER, ET AL.

Motion by Defendant, Daniel B. Brewster, to dismiss the Indictment

The Defendant, Daniel B. Brewster, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, moves to dismiss Counts 1, 3, 5, 7 and 9 of the Indictment, and says:

1. Counts 1, 3, 5, 7 and 9 improperly charge this Defendant as the principal under 18 U.S.C. § 201(c)(1) and (g) and charge him as an aider and abettor of himself under 18 U.S.C. § 2, in violation of law and the rule that one cannot aid and abet himself.

2. Counts 1, 3, 5 and 7 are unconstitutionally vague and fail to apprise this Defendant of the essential elements of the alleged crime.

3. Title 18 U.S.C. § 201(c)(1) and 201(g) are unconstitutionally vague and contain no ascertainable standard of guilt as required.

WHEREFORE, this Court is respectfully requested to dismiss the Indictment as returned against this Defendant.

NORMAN P. RAMSEY,
THOMAS H. WADDEN,
Attorneys for the Defendant,
Daniel B. Brewster.

United States District Court
for the District of Columbia
Criminal No. 1872-69

UNITED STATES OF AMERICA, PLAINTIFF

v.

DANIEL B. BREWSTER, CYPRUS T. ANDERSON, SPIEGEL, INC. DEFENDANTS

WASHINGTON, D.C.,
Friday, October 9, 1970.

The above cause came on for hearing of motions before THE HONORABLE GEORGE HART, United States District Judge, commencing at 11:00 a.m.

APPEARANCES:

For the Government: *Alan I. Baron, Esq.*
For the Defendant Brewster: *Norman P. Ramsey, Esq., Rex Reinfeir, Esq., Thomas Dyson, Esq., Thomas J. S. Waxter, Esq.*
For the Defendant Anderson: *Peter A. Greenberg, Esq.*
For the Defendant Spiegel: *William O. Bittman, Esq., Austin Mittler, Esq., William Bradford, Esq.*
Herbert J. Miller, Jr., Esq. for John J. Sullivan.

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2 PROCEEDINGS

THE DEPUTY CLERK: Daniel B. Brewster, Cyrus T. Anderson, Spiegel, Inc., Criminal 1872-69.

THE COURT: For the record, would each counsel, starting with the Government, give their name and whom they represent.

MR. BARON: Alan Baron on behalf of the Government.

MR. GREENBERG: Peter A. Greenberg, counsel for Defendant Anderson.

MR. RAMSEY: Norman P. Ramsey, counsel for the Defendant Brewster.

MR. WAXTER: Thomas Waxter, counsel for Defendant Brewster.

MR. BITTMAN: William Bittman, Austin Mittler and William Bradford, counsel for Defendant Spiegel.

Mr. MILLER: Herbert J. Miller, Jr., counsel for John Sullivan.

The COURT: Mr. Miller, I guess while you are in between, there is more room at the Government's table, so why don't you sit there.

Now, one attorney went down looking for some papers.

Mr. RAMSEY: I do not think he has returned.

The COURT: Do we need him?

Mr. RAMSEY: No. That is Rex Renfrow.

The COURT: Then we will proceed. We will proceed
3 first with the motion to dismiss.

Mr. RAMSEY: If the Court please, Norman Ramsey on behalf of the Defendant Brewster.

The COURT: I may say that anybody here who is not a member of our bar is admitted.

Mr. RAMSEY: Thank you, Your Honor.

If the Court please, the issue which I would like to address myself to first is the constitutional issue which is raised in connection with the motion to dismiss, and I would simply preface my remarks by saying that obviously we are prepared and would be willing to develop and discuss any point which the Court would like to hear extensive argument on. However, the item has been fully briefed on both sides with extremely extensive briefs covering both the history of the privilege upon which we rely and discussions generally of the current cases, the Supreme Court interpretations, the rationale of the series of cases, and it is a type issue which is susceptible of more adequate presentation in briefing form than it is by oral argument.

In order that we may be reasonably concise and to the point, I would address myself only to the high spots of what I think are our position, rather than attempt to develop the extensive history of the Speech and Debate Clause of the Constitution,
and I will address myself primarily to the considerations
4 which I believe bring it sharply to bear on the issue which currently is before this Court.

As will be noted from the briefs, we proceed from the general question of what is protected by Speech and Debate and we know and are taught by the cases which have been decided on the issue, that it is not merely speech which is protected, although in the Johnson case, which is one of the leading cases, it was a speech which was in fact involved.

Nevertheless, in the Powell case, in discussing what the Court had therefore decided, at page 502 of 395 U.S. in Powell against McCormack, the Court made this comment as respects a summation of how it had treated the Speech and Debate Clause. It was summarizing there its position drawn out of the case of U.S. v. Johnson and the Court there said, the Supreme Court said that the purpose of the clause was, "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile Judiciary."

The Court went on to say that although the clause had sprung from a fear of seditious libel actions instituted by the Crown to punish unfavorable speeches made in Parliament, that the Supreme Court had held that it would be a narrow view to confine the protection of the clause to words spoken in debate, and I am at this point, if the Court please, paraphrasing rather than quoting exactly.

The Court went on to say, and now I am quoting, that:

> "Committee reports, resolutions and the act of voting are equally covered, as are things generally done in a session of the House by one of its members in relation to the business before it."

In addition, the Supreme Court made the point that the clause not only provided a defense on the merits but that it also protected a legislator from the burden of defending himself, citing Dombrowski v. Eastland, which is also internally cited by the Supreme Court in the Powell case.

Now, as respects Dombrowski against Eastland, I think that the Supreme Court, in citing it for that proposition, relies on express language of that opinion and, accordingly, we proceed through two basic propositions: to wit, that what we are talking about are things generally done in a session of the House by one of its members in relation to the business before it, and that it goes to the right of the legislator to claim that he ought not be called into court to defend himself in connection with such activities.

Now, in this regard the papers which have been filed in the case and the data which has been supplied as respects the claims made against the Defendant Brewster make it perfectly clear that what is being attacked by this indictment are Senator Brewster's votes in committee and his votes

6 on the floor and his activities in connection with what the Supreme Court has described as things generally done in a session of the House by its members.

I therefore submit to the Court that on the basic proposition before you, sir, we have clear relevance and clear applicability of the Supreme Court rulings which bring into effect the matter which is considered in the Johnson case.

I would pass now to Johnson, which is probably the most extensive discussion by the Supreme Court of their treatment of the Speech and Debate Clause.

I will come from that, sir, down to the application given this matter in the Dowdy case by Judge Thomsen in the District of Maryland and that will round out the presentation as respects our current view of the Court's proper action in connection with our motion.

In United States against Johnson—and I am speaking now to the Supreme Court opinion, as distinct from the Fourth Circuit opinion, which is a little more widely ranging. The Supreme Court opinion restricts itself to a more narrow consideration, I believe, than Chief Judge Sobeloff did in connection with the Johnson case when it was in the Fourth Circuit. Addressing myself to the position of the Supreme Court and specifically to page 755 of the Supreme Court Reporter,

7 355 U.S. 180, the Court there was reviewing Kilbourne and Tenny and it indicated that the legislative privilege was to be read broadly to effectuate its purpose. They pointed out that those cases dealt with a criminal prosecution based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests, and the Court held, "However reprehensible such conduct may be"——

The COURT: That was a speech in Congress, was it not?

Mr. RAMSEY: That was a speech to the Congress. It was a speech by former Representative Johnson to the Congress in connection with the so-called savings and loan matters which were then current in the State of Maryland, as the Court will recall.

> "However reprehensible such conduct may be, we believe that the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of con-

spiracy to defraud the United States by impeding the due discharge of government functions."

And now we come to what we consider the essential and controlling item before the Court this morning:

"The essence of such a charge in this context is that
8 the Congressman's conduct was improperly motivated and, as will appear, that is precisely what the Speech or Debate Clause generally forecloses from Executive and Judicial inquiry."

Now, if the Court please, it is our position that in this case what the Court has before it is wholly and solely a question of motivation of the particular legislator, Senator Brewster, in connection with his conduct in the matter of postal rates pending before the Congress, that that is entirely what is before the Court, and that the Johnson opinion in the Supreme Court explicitly applies and should be followed by the Court in connection with action on our motion to dismiss.

As respects this matter, I would invite the Court's attention to the comment of the Court at page 182 of 383 U.S., where the Supreme Court pointed out that in the argument by the Government it was suggested that the Clause was meant to prevent only prosecutions based upon content of speech. This is arguing that it was only libel actions which were to be comprehended by the Clause.

The Government further argued that it was not to cover those not founded on. "The antecedent unlawful conduct of accepting or agreeing to accept a bribe," citing page 11 of the brief of the United States in that regard.

9 Now, addressing themselves to that, the Supreme Court held that while historically seditious libel might have been the most feared legal action because of its historical antecedents, and the propensity of the British Crown to use it for punishment of legislators where the Crown had taken exception to comments on the floor of the parliament, nevertheless they went on to hold this:

"We hold that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause."

And the "such inquiries" to which reference is there made, if the Court please, is motive of the Congressman.

We emphasize, they said, that our holding is limited to prosecutions involving circumstances such as those presented in the case before us.

And then we come to the area which is treated of in the Dowdy case and which is the argument which was advanced to Judge Thomsen in Maryland and which I think is the final point which I would like to make to the Court:

> "Our decision does not touch a prosecution which though, as here, founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them."

Now, we submit to the Court that this case does
10 expressly draw in question legislative acts of the defendant and his motives for performing them.

They go on to say—

The COURT: Let's see, the motive alleged, of course, is payment of money, isn't it?

Mr. RAMSEY: That is correct, sir, and improper acceptance of this money. Or, to put it; I think, more accurately, Your Honor, it is the intent to be influenced in his conduct as to something which might arise before the Congress, which is the specific charge of counts 1, 3, 5 and 7. It is acceptance of money in connection with past conduct, which is the thrust of indictment count 9, as the Court will recall. There is that distinction; 201(c) in 1, 3, 5 and 7, 201(g) in count 9 of this indictment, sir.

So we suggest to the Court that what is on file in this case, the language of the indictment itself, the particularization of the indictment, which indicates what the Government intends to rely on as demonstrating the intent to be influenced, the intent to be improperly influenced by virtue of the receipt of money, that, we say, does draw into question legislative acts and it does draw into question motives.

Then we come to the narrow exception which the Supreme
11 Court carved out of its broad finding that you should not permit a prosecution to proceed or make a legislator answerable for his motives or for his acts as a legislator and that is in the following language:

> "And without intimating any view thereon, we expressly leave open for consideration, when a case arises, a prosecution which, though possibly entailing inquiry

into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members."

Now, it is to this point that the Government addressed itself in the Dowdy matter and to which Judge Thomsen addressed himself in the course of his opinion in the Dowdy matter.

The Court will note, however, that in the Supreme Court opinion there is express reference made, in the form of a CF, note 15, to the 75 Yale Law Journal article which deals with the problem of bribery of Congressional members, and it is with this in mind that we address our argument to the Court in connection with the Dowdy opinion of Judge Thomsen.

The Court will recall, in fact, that Judge Thomsen was the presiding judge in Johnson, that he had a substantial inquiry before him in Johnson and decided it adversely to the defendant and that that decision, as respects count 1 of the 12 indictment, which was conspiracy to defraud the United States, that as to that count there was a reversal by the Court, by the Fouth Circuit, and because of the interplay of the evidence introduced in support of that count in the lower court there was an outright reversal of all counts.

The COURT: Did the first count relate to the speech?

Mr. RAMSEY: There is a little disagreement on that, Judge, in that the Fourth Circuit said that the speech aspect was almost all persuasive in the first count. There was some disagreement among the Justices, as the Court will recall, as to whether or not you couldn't excise the speech aspect and take other acts which could be probative of a conspiracy count. So, yes, sir, it did in major part, if I may characterize it in that fashion, Your Honor.

Coming down to the decision in the Johnson case and looking to what was before the Supreme Court and to take it in its proper order, what was before the Fourth Circuit and then thereafter before the Supreme Court in the Johnson case, in Judge Sobeloff's opinion in 337 F. 2d at 180, the discussion which was had at page 191 demonstrates that what they were addressing themselves to was the problem of bribery as distinct from an isolated problem of the ability of a conspiracy statute to withstand an attack on motion to dismiss. In this regard, Judge Sobeloff made this comment:

"All will agree that when a Congressman accepts compensation for a speech his act is reprehensible. However, the privilege being applicable, courts are barred from exercising jurisdiction and the duty falls upon the House of Congress to punish its offending member. It is not an unfamiliar concept to bar a conviction regardless of how contemptible a defendant's act may be, in order to protect and preserve an important constitutional principle."

He then goes on to cite the cases of Gideon and Map as representative of the fact that it is not always the case that the most noteworthy of your citizens represent your great constitutional privileges and your great constitutional principles.

Addressing himself to the question of whether or not, as the Government took the position that if a man is innocent of taking a bribe, what's he worried about, Judge Sobeloff again at page 191 made this comment:

"It is no answer therefore to say that if the accused member is innocent of accepting a bribe he has nothing to fear. A groundless charge may be sufficient to destroy him at the polls. Moreover, the process of indictment by a grand jury and inquiry in a court may itself be so devastating that an innocent Congressman may well fear it."

Now, that was apropos a lead-off paragraph or sentence of the same paragraph, which was as follows:

"The design of the Speech and Debate Clause is to promote the independence of all Congressmen. To avoid restraint on free expression on the floor of either House, protection is given against the hazard and harassment of inquiry in any court."

Now, looking to the decision in the Supreme Court with respect to Johnson and trying to see whether or not they were really talking about bribery as such or whether they were talking about a more narrow problem, the summary which the Supreme Court Justices make with respect to what was before them points out quite clearly that the thrust of the Government's case was that the alleged defendants or the alleged interested persons who were in the savings and loan industry in Maryland, and I am quoting now from page 172 of 383 U.S., where they made this comment:

"For these services Johnson received substantial sums in the form of a campaign contribution and legal fees. The Government contended, and presumably the jury found, that these payments were never disclosed to the Department of Justice and that the payments were not bona fide campaign contributions or legal fees but were made simply to "buy" the Congressman."

The Court is addressing itself, in other words, to the problem of the bribed Congressman in connection with the Johnson case, both in the Fourth Circuit and at the Supreme Court level. It is addressing itself to whether the alleged existence of this type motivation can or cannot constitute a basis for judicial inquiry into Congressional conduct and it concludes that it cannot.

Now, we have come full circle on the reasoning, if the Court please, as I see the proposition before the Court this morning. That is to say, if you are testing by an indictment conduct or motivation of a legislative type, it is forbidden and proscribed by the Speech and Debate Clause under all the applicable authorities.

The Court: Let me see if I understand your contentions clearly. In other words, your contention would be that if Individual A gives Congressman or Senator B $10,000 to vote yea or nay on a particular bill in the Congress, that that is covered by the Speech and Debate Clause?

Mr. Ramsey: I concur, sir.

The Court: That is your contention?

Mr. Ramsey: Yes, sir.

The Court: Likewise, were such a sum given to vote yea or nay in an executive session on voting a matter in or out or whatever, that that would likewise come under the Speech and Debate Clause, do I understand that to be your contention?

Mr. Ramsey: I think that is a fair statement, Your Honor, of my position, yes, sir.

If I might just add one sentence to it, sir. The reason I say that is that it fits within what I consider to be legislative action, which is what I read the cases to cover.

The Court: Well, now, how is Dowdy similar to Brewster and how does it differ from Brewster?

In Dowdy I believe you had an allegation of giving money to do something with an Executive part of the Government, did you not?

Mr. Ramsey: That is correct. It is contended that in the Dowdy case, that Dowdy was involved in a conspiracy to commit a violation of 18 U.S.C. Section 371, to receive compensations for services to be rendered by Dowdy and others in a proceeding in which the United States was a party and had a direct and substantial interest before a departmental agency and officer. So, it is receipt of money in connection with that, sir.

17 The Court: Well, to that extent that does not apply to the Brewster case, does it?

Mr. Ramsey: It does not expressly address itself to the Brewster case, no, Your Honor. But the reasoning—I am not trying to dodge Judge Thomsen's opinion by representing to the Court that it is not a matter which ought to be considered. That is not my position, sir. I think Judge Thomsen did bring himself, in his opinion, to address himself to the issue before the Court, so it is not my position that this is an irrelevant——

The Court: But I was trying to determine in what respect he did. There must be other counts, then, that become similar in the Dowdy case, that become similar to the counts in the Brewster case.

Mr. Ramsey: I think where you get into that, if the Court please, is in a discussion in the latter portion of Judge Thomsen's opinion, which I know the Court has available to it.

The Court: I have it right here.

Mr. Ramsey: Where at page 8 of the typescript of the opinion Judge Thomsen is addressing himself to counts 1 and 3, which he finds to be offenses which are based on, "narrowly drawn statutes passed by Congress in the exercise of its legislative power to regulate the conduct of its members." And he thereby attempts to reason that in those statutes, the

18 conflict of interest statutes and bribery statute, he analogizes and talks about those in that regard and says that they are narrowly drawn statutes in the exercise of Congress' power.

The Court: I am not sure that I am following you or we are understanding each other.

You would not, for example, contend that it would not be unlawful for a Senator, say, to take a certain sum of money in

order to obtain a pardon from the Executive Branch of the Government. At least that would not be covered by the Speech and Debate Clause.

Mr. RAMSEY: No, I agree, Your Honor.

The COURT: Well, now, to what extent was that type of thing involved in Dowdy and was that the only type of thing involved in Dowdy, or do we have involved in Dowdy the alleged taking of a bribe to allegedly do the same thing alleged against Brewster in this case?

Mr. RAMSEY: If the Court please, I think the answer to that is, when Judge Thomsen was addressing himself in the latter portion of his opinion he was talking to count 3, and count 3 in the Dowdy case is premised on a violation of 18 U.S.C. Section 1952 in that the defendant is alleged to have traveled in interstate commerce to carry on an unlawful activity, to wit, bribery within 201. Do I now bring the point I am making to the Court? That is to say, count 3 deals with alleged interstate transportation or use of interstate commerce, rather, to carry on an unlawful activity, to wit, bribery. So there the Judge is addressing himself to 201 and 201(c) are what are precisely before the Court in the Brewster matter.

The COURT: All right.

Mr. RAMSEY: Now, coming down to the problem debated and decided by Judge Thomsen, and opposed to the position we would ask this Court to take, speaking quite candidly, we simply submit that the Judge cannot possibly be right under the controlling authorities in the Supreme Court and in the Fourth Circuit; and we further suggest to the Court that although the Court has earlier heard argument with respect to alleged vagueness of the statutes, of 201(c) and 201(g), unconstitutional vagueness, if the Court please, which was the concept which we advanced in another memorandum submitted to the Court in connection with another aspect of the motion to dismiss, our position is this, sir: That the Supreme Court had available to it and on the books at the time it was hearing the Johnson case the very statute now before this Court and that the Supreme Court was not talking about the current version of 201 as a "narrowly drawn statute" but that in fact it is constitutionally too vague to be a statute which can meet the description of a narrowly drawn statute.

The cases which have interpreted it, the very essence of the statute itself, makes it perfectly clear that it is broad, extremely broad, not narrow. It is a pistol shot. It is a shelling of the woods in the fashion of the artillery, and that as a result of that we simply cannot accept the Gertrude Stein reasoning that a rose is a rose because I say it is a rose.

The indictment which has been drafted under those sections and which is before this Court demonstrates that it is not and is not intended to be a narrowly drawn statute or a narrowly drawn indictment. The Court will recall that what is alleged is, in the early counts, that action or vote or decision would be influenced with respect to items which might come before the Defendant Brewster in his official capacity, not which did.

Further, the allegation is made that, in the early counts—and I am excluding count 9 so that I don't confuse that, because I will address myself to that in a moment—not only does the indictment speak in terms of things which might come before the Defendant Brewster but as to one particular count, the first count, what is involved there is postal legisla-

21 tion which had not yet been alleged to have arisen in the Congress of which Senator Brewster was a member. That is the count which deals with a check in the time preceding the convening of the Congress in which the postal regulation bill was introduced.

Now, second, if I may thrust this forward just a moment in connection with the detail of the indictment before the Court, not only do you have this concept of it might be before him, but you have the concept in this statute of on his own behalf or on behalf of some other entity.

So that you have built into this all the vagueness which is denounced and you do not, to put it in the converse, you do not have the narrowly drawn statute which is contemplated.

Nor did the Supreme Court, with that statute on the books, indicate that it felt that the bribery statute then extant as at the time of Johnson was an adequate and narrowly drawn statute which would meet the specifications set in the Johnson opinion in connection with the exclusion from the sweeping language of the protection against inquiry into motivation and legislative conduct of a particular Senator or Congressman.

Now, it is our position, sir, that as to counts 1, 3, 5 and 7, which are the early counts, count 1 has the peculiarity of being antecedent to any legislation being in the Congress.

22 Counts 2, 3, 5 and 7 have relation to a time when, a point in time when postal rates were before the Congress, but they speak in terms of might and not in terms of were. They do not speak in terms of necessarily having payment made to him but to another entity, and in each of these respects we submit that we are not dealing with an indictment, nor are we dealing with an underlying statute which can possibly meet the test of narrowly drawn.

As to count 9, which is 201(g), still a different consideration prevails because in 201(g), unlike 201(c) which requires a corrupt intent, we feel it does not add sufficient definition to the statute but it may or may not add greater definition in the statute than does in (g) where the word corruptly is completely omitted from the statute.

So, if I may characterize our position, counts 1 and 9 have slight variables in them. Counts 3, 5 and 7 we feel are premised on definitely an unconstitutionally vague statute, certainly not a statute which meets the narrow concept which the Supreme Court was talking about, not a statute which the Supreme Court has approved as sufficiently narrowly drawn, but one which we submit Judge Thomsen erroneously concludes is a narrowly drawn statute and which we believe is demonstrably not a narrowly drawn statute, which by process of reasoning leads to our position and contention that Judge Thomsen's reaction and result when he finds it a narrowly drawn statute, we think (a), to be unsupported in his opinion; (b), to

23 be incorrect; and (c), to fly directly in the face of Johnson and the other controlling Supreme Court and Fourth Circuit authorities.

Now, sir, I will not belabor the point. I have brought it, I think, full circle and unless the Court would like me to develop further a given aspect of the matter, I would thank the Court for its attention and say that I stand ready to answer any questions which might be addressed to me, sir.

The COURT: Well, I think I would like to hear from the Government, but before I do, do any of the other defense counsel have anything they want to say about this?

Mr. MITTLER: If the Court please, Austin Mittler for the Defendant Spiegel.

Your Honor, we have filed an extensive motion to dismiss on the same grounds just advanced by Mr. Ramsey on behalf of the Defendant Brewster.

In addition, we have filed an extensive memorandum of law dealing with the same subject, the unconstitutionality of 18 U.S.C. Section 201.

In our papers we developed the point one step further, the extent to which this point is applicable to the Defendant Spiegel, and on that point it gets us into a discussion of
24 the inseparability of the statute with which we are dealing here and in the event the Court determines that 18 U.S.C. is unconstitutional as applied to the Defendant Brewster, it likewise is unconstitutional as applied to the Defendant Spiegel.

Our argument, however, Your Honor, does not come into play unless and until this Court makes a determination that the statute is unconstitutional as applied to the defendant Brewster.

So, I would reserve the right to make further argument on the separability point until Your Honor has made a ruling with respect to the basic question presented by Mr. Ramsey on behalf of the Defendant Brewster.

Mr. GREENBURG: Peter Greenburg for the Defendant Anderson, Your Honor.

We would take the same position as Mr. Mittler has taken for the Defendant Spiegel. We have joined in their motion and we ride pretty much the same rail with respect to this point in that the Court must first determine the issue with respect to Defendant Brewster and then the question of how we fit into this would then become proper.

Thank you.

Mr. BARON: If the Court please, Alan Baron, representing the Government in this case.

Your Honor, I am not going to cover once again the
25 ground which I believe has been plowed so deeply and thoroughly in the memoranda and in the arguments referred to heretofore, but I simply would like to make several points.

I think Your Honor's hypothetical to Mr. Ramsey flushed out what may be at the heart of this entire discussion.

The COURT: Well, if I have I am not aware of it.

Mr. BARON: Well, perhaps I can elaborate on that.

If Your Honor will recall, you asked Mr. Ramsey if a man paid a Congressman or a Senator $10,000 to make a speech and the Senator went ahead and made the speech in response to the quid pro quo, would he be protected under the Speech and Debate Clause, and Mr. Ramsey said yes, that is his contention.

Your Honor, I submit and I refuse to believe that election to the Congress of the United States is the equivalent of a license to steal. I cannot believe that that is the message of the Speech and Debate Clause. I can't believe that is the message of the Johnson case.

No one can doubt the validity of a policy which is intended to protect a Senator or Congressman from civil or criminal liability for his "legislative acts," and to the extent that the Speech and Debate Clause still affords that protection, I think it serves an extremely important purpose. But I submit that there is another policy at work here and it is a policy
26 which the Congress has recognized for over 100 years and that is that the public has to have confidence in the integrity of the legislative process and that criminal sanctions for bribery, conflict of interest activities on the part of Congressmen are necessary to protect the integrity of that process and that the Federal Judiciary is the appropriate forum in which to try any such cases.

Now, it is for that reason that Congress has seen fit for over 100 years to delegate to the Executive and to the Judiciary the power to try members of Congress for bribery and conflict of interest activities and it is a power which the Congress can revoke if it believes it is being abused.

The Congress has simply recognized, we submit, that they are ill-suited to deal properly with those members who may be guilty of corrupt activity.

Now, what better forum than the Federal courts, which are themselves, except for the Supreme Court, created by the Congress——

The COURT: Well, I don't know that that answers the problem. The Congress itself can't question why a Senator does anything in a representative capacity, as such, can they?

Mr. BARON: Your Honor, I believe they could. I
27 don't believe that they are required to do so and that they are the exclusive source of sanctions. It is a power that, we submit, they can and have delegated to the Judiciary.

with all of the protections of the criminal law which the entire mechanism is precisely constructed to try cases in which accusations are made against individuals. The Congress is not geared for that.

The COURT: Let's approach this from another way. It is not true that the Supreme Court said that Thomsen could not be prosecuted for accepting money to make a speech on the floor of the House?

Mr. BARON: Did you say Thomsen or Johnson?

The COURT: Johnson, I mean.

Mr. BARON: Yes, sir, under 371, the general conspiracy to defraud the United States statute, yes, sir. That was their very limited holding. They were quite specific about that.

The COURT: Now, the thrust of your indictment here is that Senator Brewster accepted bribes for, in effect, to vote or voting as the people who are alleged to have given him the money wanted on certain types of legislation. How does that differ from the Johnson matter?

Mr. BARON: I believe it does differ from the Johnson matter in a very basic respect, Your Honor. I think we are right to focus on Johnson because that really is the seminal case for our purposes, although it hardly decided the question. What it did do, I submit, was leave open the question of inquiry into legislative acts.

I submit by leaving open that question they specifically rejected the contention that Mr. Ramsey is pushing for here today. They left it open.

If it were so clearcut, if that example that you gave, if that were the answer, there is no question to leave open, that is the end of it.

They did leave that question open and that is the question before you today.

They left open the question of inquiry into legislative acts when the prosecution is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

Now, I submit that what the defendants have tended to do to Johnson is to focus on the first part of that. They say a narrowly drawn statute and as if this connotes some kind of special kind of legislation, a special kind of standard of draftmanship, perhaps a special kind of vagueness test which is

applicable only to members of the Congress and not to the common folk.

I submit that is simply not tenable. I think you have to read the whole sentence, "a narrowly drawn statute," and I would stress this part, "passed by Congress in the exercise of its legislative powers to regulate the conduct of its members."

That description, I submit, fits Section 201.

Section 201, unlike 371, which was involved in Johnson, focused directly, was focused directly by the Congress upon members of the Congress. That is the distinction from Johnson.

The Court: You know, to me an interpretation of the law is supposed to be common sense and all these nice differentiations sometimes escape me.

But we have the Constitution, which in the Speech and Debate Clause definitely intends to protect Senators and Congressmen from being questioned as to why as a Senator or a Congressman they voted a certain way, made a certain speech in the Congress or voted a certain way in committee, or I should think it might certainly extend to arguing with other Senators why they should vote for their point of view and whatnot.

Now, surely the framers wished to protect these members from being constantly heckled and accused of improper motives, certainly as far as the criminal law is concerned, for what they did.

Now, if that is the purpose of it aren't we in this case, in effect, or isn't the Government in this case, in effect, questioning Senator Brewster for his legislative actions in committee and on the floor? That is what I am having trouble getting around.

Now, there are some circumstances that maybe it is impossible to stop Representatives and Senators from being rascals. I am not speaking of Senator Brewster, nothing so far has been proven against him. I am speaking generally. Except, of course, the will of the people, which is the final judge in these cases.

I don't know, but I must admit this thing gives me a lot of trouble and seeing the trouble I am in, what can you do to cast some light in my mind?

Mr. Bacon: Your Honor, I submit this: I don't want to pretend it is a clearcut question. It is terribly troublesome and

it is one the Supreme Court didn't reach in Johnson. Obviously they left it open for you to struggle with or for Judge Thomsen to struggle with in Maryland.

I submit that if all we had were the Speech and Debate Clause in the Constitution, if there were no section 201 passed by the Congress, the very body which has the right to claim the privilege under the Speech and Debate Clause——

The COURT: Congress can't change the Speech and Debate Clause except by submitting a Constitutional Amend-
31 ment.

Mr. BARON: I submit, Your Honor, they have the power, however, to regulate their own membership and we submit they have the power to delegate the power to regulate their own membership.

And that if there were no section 201 or its equivalent, I would say that we are stymied, it is a license to steal. But Congress, having exercised that power, Congress having, in effect, said to the Judiciary and to the Executive you have the authority by virtue of our legislation to investigate, to try Congressmen who may be guilty of corrupt activities, I submit that 201 is the mandate for proceeding.

The COURT: We are now just talking about corrupt activity in your legislative capacity. I wouldn't have any trouble with the allegations of the Dowdy matter as to accepting money to try to affect the Executive Branch of the Government or the Judicial, should such a thing happen. But I must admit I am having trouble with whether Congress itself has the power.

If Congress does not have the power they can't give it to us.

Does Congress itself have the power to question why a man voted a certain way, why he argued a certain way, why he made the representations he made in executive committee and whatnot, does Congress itself have that power?

It isn't enough just to say that Congress has given
32 it to the courts. Have they got it to give?

Mr. BARON: Your Honor, I submit that they do. I think that Powell certainly reflects that, whatever else Powell may say, which probably raises more questions than it answers. I think Powell does reflect that they do have the right to discipline their members and to regulate the conduct of their members and I submit——

The COURT: They have got a right to regulate certain conduct of a member and, of course, under one section of the Con-

stitution, by a two-third vote, presumably subject to Supreme Court opinion, they have a right to remove a man from the Senate almost without giving any cause; but that could be done without questioning the manner in which he voted or manner in which he spoke or the manner in which he acted in his purely legislative capacity.

This thing gives me a lot of trouble.

Mr. BARON: Your Honor, I would not begin to pretend it is not a troublesome point. It is one which I assume some day the Supreme Court is going to resolve for us, more or less.

But I do submit, Your Honor, that Congress does have this inherent power to inquire, yes, even into the integrity of its own process, and it does have the power to delegate that

33 should the Congress determine in its wisdom that it, as a body, is simply not capable of performing that function which it has the inherent power to perform. They have the power to delegate that to the most appropriate forum of all, the Federal Judiciary. And should it be abused by the Federal Judiciary, Congress can revoke that power.

The COURT: That is not the question. The question becomes simple. Does Congress itself have the power to question the speech and debate of one of its members with the necessary legislative matters that go along with it? If it has, it can give it to the courts. If it doesn't, it can't give what it doesn't have.

Well, tell me this: does the indictment in any wise allege that Brewster did anything not related to his purely legislative functions?

Mr. BARON: We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that.

But they were also legislative acts, I submit, in Dowdy.

The COURT: What was the legislative act in Dowdy? I don't consider trying to get an Executive Department to do something for a constituent as being legislative. That would not strike me as being so.

34 Mr. BARON: On Page 7 of Judge Thomsen's opinion—they were not as squarely presented, there weren't as many squarely legislative acts in Dowdy as we have here. On page 7 of Judge Thomsen's opinion, where we have (a), if I may read it:

"With the exception of certain overt acts which charge one, that Dowdy used his official position to obtain records which were later turned over to Cohen and, two, that he discussed with co-conspirators to have Cohen testify, it is within the meaning of Johnson."

Implying, of course, that these specific acts Judge Thomsen regarded as legislative acts. Then he went on on page 8, where he had to face the question which I submit is squarely presented here, and he accepted it and I think rightly so.

The Supreme Court found Judge Thomsen made a mistake the first time. I don't believe, given another chance, he is going to make it again or has made it again. I think in many ways he had a tougher problem and he was back at the conspiracy statute again. He was one step removed from what we have here.

The proceeding in our case is, of course, a direct prosecution in 201. What we have in Dowdy is a conspiracy to commit 203 and, I believe, 1952. I am not positive.

But in any event, it was back to the old conspiracy section but this time it was not simply the general conspiracy to defraud the United States, which you had in Johnson, it was a conspiracy to commit crimes which might have been charged under the narrow acts.

So, Judge Thomsen in that respect had another hurdle to jump. He was one step removed from the direct act. It was still a conspiracy and yet he still concluded that that prosecution, the prosecution in Dowdy was proper in light of Johnson.

I submit that in our case 201 is the mandate from Congress for this Court to try this case.

The COURT: I have a tremendous respect for Judge Thomsen. I consider Judge Thomsen one of the ablest judges in the country. But it doesn't necessarily mean we agree in this matter.

Tell me this: If this is permissible, what is to stop a President who is unhappy with the vote on a bill having his Attorney General bring an indictment against a dozen Congressmen for the way they voted on a bill, alleging that they were bribed? What is to stop that? Now, if you say, well, a proper President and a proper Attorney General would never do such things, of course we have laws to protect people against things being done improperly. If everything is done

36 properly we wouldn't need many laws. What is to stop it if this is permitted?

Mr. BARON: You; the Federal Judiciary.

The COURT: Well, we are not God.

Mr. BARON: No, sir.

The COURT: We can't stop them being brought. We can throw them out but we can't stop them being brought.

Mr. BARON: May I turn the question around—

The COURT: And we may not be able ourselves to do anything about it until there has been a public trial degrading the Congressman or Senator.

You know, this Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought just to be putting words in. This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't very often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together.

Mr. BARON: I don't mean to downgrade it for a moment, Your Honor, but let me turn your question around. Your question was whether an unscrupulous Executive might, in effect, institute improper, unwarranted actions against the legislature. That is, yes, a risk created by 201. On the other hand the Speech and Debate Clause creates the other side

37 of the coin: that is, unscrupulous legislators, in effect, walk into the Congress with a license to steal. That is also a risk. It is a risk which the Congress has recognized and is in the balance.

Perhaps the answer is they are trusting the Executive not to act unscrupulously and the Federal Judiciary in the final analysis to act as an adequate barrier. They have more reliance on that than, perhaps, the license which otherwise every Congressman would have as soon as he were elected to office.

There are risks on both sides. The balance has been struck by the Congress in Section 201.

The COURT: Well, no, the balance was struck by the framers of our Constitution. We have got to determine what that balance is.

Mr. BARON: I submit that the balance—the absence of any kind of braking device in the absence of a 201 or equivalent, the

balance struck by Speech and Debate is all one way, it is a complete immunity.

The COURT: Well, except for the voters and except for the possibility of the provision in the Constitution, the exact section of which I don't recall at the moment, which provides by two-thirds vote of the body the Congress may expel a member.

Mr. BARON: Your Honor, I think the notion that it
38 would be by the voters, one, you have the fact a Senator has six years, it is a very long process in which to be in there without an immunity of this kind.

In the absence of any reason for the Executive to investigate, nothing would come to light. The Executive wouldn't spend its time investigating matters in which it could never take any further steps.

The COURT: Well——

Mr. BARON: I think the remedy of the ballot box would be non-existent, fictitious.

The COURT: Maybe so, maybe so. All right.

Mr. BARON: I think I will rely beyond that on the memoranda which have been submitted, Your Honor.

The COURT: Does anyone else have anything to say?

Mr. MITTLER: Yes, Your Honor, there are just one or two items that I would like to cover in light of some of Your Honor's comments.

Section 201, the statute in question, is a statute which prohibits the taking of a bribe and the giving of a bribe to a Congressman, all covered within the purview of the one statute. This particular statute, which went into effect in 1962 as part of the bribery, graft and conflict of interest act of that year, does not contain a separability clause as some statutes do. It does not contain a clause which says that in the event
39 a court were to determine that one part of the statute is unconstitutional, that the other part of the statute should survive and have vitality.

Under these circumstances, the Supreme Court in the case of Carter Coal Company has said that this gives rise to a presumption, a presumption that the proponent of the statute must overcome, a presumption that the entire statute must fall. It was said as follows:

"In the absence of a separability clause the presumption is that the legislature intends an act to be effective as an entirety. If any provision be unconstitutional the

presumption is that the remaining provisions fall with it."

The COURT: What is the purpose of the argument you are now making to me?

Mr. MITTLER: I want to get before Your Honor for the Court's consideration the position of Spiegel in the event the Court were to decide that the statute is unconstitutional as applied to the Defendant Brewster. It is our contention, under those circumstances, that it is likewise unconstitutional—

The COURT: I am not ready for that argument yet.

Mr. MITTLER: Then I will reserve it, Your Honor.

Mr. RAMSEY: If the Court please, may I make one comment, sir?

The COURT: Yes.

40 Mr. RAMSEY: I would simply come back, if the Court please, to the fact that what was being decided in Johnson by both Judge Thomsen, the Fourth Circuit and before the Supreme Court, was almost four-square on the bribery statute.

I point this fact out at page 189 of the Johnson opinion in the Fourth Circuit. Judge Sobeloff made this comment:

> "While it is true that count 1 of the indictment alleges a 'conspiracy to defraud the United States' and not bribery, the District Court by citing Federal and State statutes which make the acceptance of a bribe a criminal act, recognize the close relation between the two. The District Judge also noted that in no instance had the constitutionality of the Federal or State bribery statutes ever been questioned. Reasoning by analogy from these statutes and the cases decided under them, which do not, however, discuss the constitutional question, the Judge concluded that the prosecution of a member of Congress for receiving money from a private person for making a speech on the floor of the House would not be barred by Article 1, Section 6, Clause 1 of the Constitution."

41 "It was this reasoning of Judge Thomsen which was reversed by the Court of Appeals and affirmed by the Supreme Court, the Fourth Circuit being affirmed by the Supreme Court.

I think that Mr. Baron's point as respects the license to steal is badly taken because very many of the cases in this field point

out that Congress has itself an interest in protecting its integrity, has itself an interest in providing adequate sanctions against those members who do not conform to conduct which is expected of Congressmen, Senators, and using that to encompass both House and Senate.

And as a practical matter, that as to this action which is brought here, we do have a situation where, in our opinion, sir, and we most earnestly urge that the entire issue has been the subject of consideration, of detailed consideration and of ultimate determination in the Fourth Circuit and thereafter by the Supreme Court, since the Supreme Court also approached this as a question of the sufficiency of the bribery aspect, even though the indictment in form was a conspiracy to defraud.

42 OPINION OF THE COURT

The COURT: Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7 and 9, as they apply to Senator Brewster.

I would like to expedite an appeal in this matter in any way that we can get this matter settled finally by the Supreme Court.

Now, would the Government contend that even though the indictment is dismissed as to Brewster, that it could still carry on as to Spiegel and Anderson?

Mr. BARON: Yes, sir, we most assuredly do.

The COURT: Gentlemen, I think on that question I would like to continue the argument at 1:30.

(At 12 noon the hearing stood concluded.)

United States District Court for the District of Columbia

Crim. No. 1872-69

[Filed 11-3-70. Robert M. Stearns, Clerk]

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER

Order

This matter having come before the Court for a hearing on the defendant's motion to dismiss the indictment, and such hearing having been held, it is by the Court this 3rd day of November, 1970.

ORDERED that the defendant's motion be granted, and the indictment be and hereby is dismissed as to the defendant Brewster for the reasons stated orally by the Court at the hearing on October 9, 1970.

(s) GEORGE L. HART,
Judge.

A true copy:

JAMES F. DAVEY,
By (s) LILLIAN COHEN,
Deputy Clerk.

[SEAL]

United States District Court
For the District of Columbia

Crim. No. 1872-69

[Filed, 11-4-70, James F. Davey, Clerk]

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER

Notice of Appeal

Notice is hereby given that the United States of America hereby appeals to the United States Supreme Court, pursuant to 18 U.S.C. § 3731, from the order of this Court entered No-

vember 3, 1970, dismissing the indictment herein as to the defendant, Daniel B. Brewster.

(s) THOMAS A. FLANNERY,
United States Attorney.
(s) JOHN A. TERRY,
Assistant United States Attorney.
(s) DONALD S. SMITH,
Assistant United States Attorney.

Supreme Court of the United States

No. 1025, October Term, 1970

UNITED STATES, APPELLANT

v.

DANIEL B. BREWSTER

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

March 1, 1971.

U.S. GOVERNMENT PRINTING OFFICE 1971

FILE COPY

No. ———

NOV 30 1970

E. ROBERT SEAVER

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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WILL WILSON,
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The district court did not deliver a written opinion. Its oral opinion is set out in Appendix A, *infra* p. 8.

JURISDICTION AND STATEMENT

On October 9, 1970, a judge of the United States District Court for the District of Columbia orally granted respondent's pre-trial motion to dismiss counts 1, 3, 5, 7, and 9 of a ten-count indictment charging respondent, a former United States Senator,

with soliciting and receiving bribes in amounts totalling $24,500 from Cyrus T. Anderson, the Washington, D. C. lobbying representative of Spiegel, Inc., a large mail order company, in violation of 18 U.S.C. 201(c)(1) and 18 U.S.C. 201(g). The indictment is set forth in Appendix D, *infra* pp. 12-19.[1] The essence of the charges was that respondent, during his tenure as a Senator, accepted bribes in return for influence in the performance of official acts as a member of the Senate and the Senate Committee on the Post Office and Civil Service with regard to votes and other legislative actions on postal legislation. The district judge ruled that the speech or debate clause of the Constitution (Art. I, Sec. 6) shielded respondent "from any prosecution for alleged bribery to perform a legislative act" (Appendix A, *infra* p. 8).

The district court's formal order of dismissal was entered on November 3, 1970 (Appendix B, *infra* p. 9). A notice of appeal to this Court was filed in the district court on November 4, 1970, under 18 U.S.C. 3731 (Appendix C, *infra* pp. 10-11).

This Court has jurisdiction, under 18 U.S.C. 3731, over a direct appeal from the decision or judgment of a district court dismissing an indictment or count thereof based upon the invalidity of the statute upon which the indictment is founded. See, *e.g.*, *United*

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[1] Counts 1, 3, 5, and 7 charged the offense under Section 201(c)(1); count 9 charged a violation of Section 201(g). The remaining counts of the ten-count indictment charged Cyrus Anderson and Spiegel, Inc. with offering and giving the bribes, in violation of 18 U.S.C. 201(b).

States v. *Spector*, 343 U.S. 169; *United States* v. *Petrillo*, 332 U.S. 1.[2]

QUESTION PRESENTED

Whether the Constitution, particularly Article I, Section 6, providing that "for any Speech or Debate in either House, [members of Congress] shall not be questioned in any other Place," bars criminal prosecution of a Senator under express statutory provisions making it a crime for a member of Congress to accept a bribe in exchange for the performance of legislative acts.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> * * * for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place.

18 U.S.C. 201(a) provides in part:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States,

---

[2] Alternatively, if the district judge's action is viewed as the granting of a "motion in bar," see *United States* v. *Covington*, 395 U.S. 57, 59, this Court also has jurisdiction over the appeal under 18 U.S.C. 3731, since the motion was granted before the attachment of jeopardy.

or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government, or a juror;

* * * *

18 U.S.C. 201(c)(1) provides:

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act; [shall be guilty of an offense]

18 U.S.C. 201(g) provides:

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; [shall be guilty of an offense]

THE QUESTION IS SUBSTANTIAL

In *United States* v. *Johnson*, 383 U.S. 169, this Court held that, in a prosecution for conspiracy to defraud the United States under the general conspiracy statute (18 U.S.C. 371), the government was precluded by the speech or debate clause from introducing proof that a Congressman agreed to and did

deliver a speech on the floor of the House of Representatives as part of the scheme.[3] After reviewing the relevant history and precedents, the Court concluded that the principal purpose of the clause was "to prevent intimidation [of legislators] by the executive and accountability before a possibly hostile judiciary." 383 U.S. at 181; see also *Powell* v. *McCormack*, 395 U.S. 486, 502. It viewed that indictment as "focused with particularity" on the underlying motives of the Congressman for making the speech and its contents and held that his "prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." *Id.* at 184-185. The Court pertinently stated, however, (*id.* at 185) that

> * * * without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

This case presents the issue which the Court specifically left undecided in *Johnson:* Whether Con-

---

[3] The court held that a new trial could be had on the conspiracy charge with all reference to the allegation regarding the giving of the speech removed. *Id.* at 185. Subsequently, Johnson was retried and convicted on substantive conflict of interest charges involving attempts to influence the Department of Justice, and his conviction was affirmed. *United States* v. *Johnson*, 419 F. 2d 56 (C.A. 4), certiorari denied, 397 U.S. 1010.

gress may constitutionally enact a statute providing for judicial sanctions against a member who accepts a bribe for performance of a legislative act, without impinging upon the rights protected by the speech or debate clause. We believe that Congress has such constitutional power; that the statutory provisions here in question reflect a proper exercise of that power; and that the district court erred in dismissing the counts of the indictment naming respondent.

Over more than a hundred years Congress has consistently enacted legislation making it a crime for a member of Congress to accept a bribe to influence his legislative decisions. See Act of February 26, 1853, c. 81, 10 Stat. 170. In 1962, when Congress undertook a comprehensive revision of the bribery, graft, and conflict-of-interest laws, it again included its own members in the definition of "public officials" whose delicts are judicially punishable. See 18 U.S.C. 201 (a), *supra* pp. 3-4. Thus Congress has consistently proscribed bribe-taking in connection with a member's official duties without evidencing any concern that punishment of the corrupt antecedent conduct would hamper the legislative process. The manifestly important question whether it constitutionally may do so should be resolved by this Court.[4]

---

[4] We note that a result consistent with the view we advocate was recently reached by Chief Judge Thomsen, in an opinion denying the motion of former Congressman Dowdy to dismiss criminal charges against him based upon bribery. *United States* v. *Dowdy, et al.* Cr. No. 70-0123. (D. of Md.) decided on July 16, 1970.

CONCLUSION

Accordingly, probable jurisdiction should be noted in this case.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROGER A. PAULEY,
Attorneys.

NOVEMBER 1970.

APPENDIX A

OPINION OF THE COURT

THE COURT: Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in Johnson, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7 and 9, as they apply to Senator Brewster.

I would like to expedite an appeal in this matter in any way that we can get this matter settled finally by the Supreme Court.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1872-69

[Filed 11-3-70, Robert M. Stearns, Clerk]

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER

ORDER

This matter having come before the Court for a hearing on the defendant's motion to dismiss the indictment, and such hearing having been held, it is by the Court this 3rd day of November, 1970.

ORDERED that the defendant's motion be granted, and the indictment be and hereby is dismissed as to the defendant Brewster for the reasons stated orally by the Court at the hearing on October 9, 1970.

s/ George L. Hart
Judge

A TRUE COPY
JAMES F. DAVEY

By s/ Lillian Cohen
Deputy Clerk

[SEAL]

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Crim. No. 1872-69

[Filed, 11-4-70, James F. Davey, Clerk]

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER

NOTICE OF APPEAL

Notice is hereby given that the United States of America hereby appeals to the United States Supreme Court, pursuant to 18 U.S.C. § 3731, from the order of this Court entered November 3, 1970, dismissing the indictment herein as to the defendant, Daniel B. Brewster.

s/ Thomas A. Flannery
United States Attorney

s/ John A. Terry
Assistant
United States Attorney

s/ Donald S. Smith
Assistant
United States Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that service of the foregoing Notice of Appeal has been mailed to counsel for defendant, Thomas Wadden, Jr., Esquire, 888 - 17th Street, N.W., Washington, D. C. 20006, and Norman R. Ramsey, Esquire, 10 Light Street, Baltimore, Maryland, this 3d day of November, 1970.

/s/ Donald S. Smith
Assistant
United States Attorney

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Holding a Criminal Term

Grand Jury Sworn in on April 1, 1969

Criminal No.

Grand Jury No. Original

UNITED STATES OF AMERICA

v.

DANIEL B. BREWSTER, CYRUS T. ANDERSON,
SPIEGEL, INC.

Violation:

18 U.S.C. 201 (Bribery of Public Officials).
18 U.S.C. 2 (Aiding and Abetting)

The Grand Jury charges:

FIRST COUNT:

(1) At all times hereinafter mentioned in this indictment, Daniel B. Brewster was a public official of the United States, that is, a member of the Senate of the United States from the State of Maryland.

(2) At all times hereinafter mentioned in this indictment, Daniel B. Brewster, in his capacity as a United States Senator, served as a member of the Committee on Post Office and Civil Service of the Senate of the United States.

(3) At all times hereinafter mentioned in this indictment, the Senate of the United States, pursuant to Standing Rule 25.1(n)(3), referred all proposed legislation relating to the postal service to the standing Committee on Post Office and Civil Service.

(4) During the First Session of the Ninetieth Congress, the Congress of the United States was considering legislation to adjust postage rates.

(5) At all times hereinafter mentioned in this indictment, Spiegel, Inc., a Delaware corporation, was engaged in the sale of merchandise, principally by mail and through catalogs.

(6) At all times hereinafter mentioned in this indictment, Cyrus T. Anderson was a lobbyist who was registered with the Secretary of the Senate and the Clerk of the United States House of Representatives and who represented Spiegel, Inc.

(7) On or about January 10, 1966, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity, that is, the "D. C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201 (c) (1) and 2, Title 18, United States Code.

SECOND COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them therein by reference.

(2) On or about January 10, 1966, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D. C. Committee for Maryland Education", with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

THIRD COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 16, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself from Cyrus T. Anderson and Spiegel, Inc. in return for being

influenced in his performance of official acts in respect of his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

FOURTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 16, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

FIFTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about April 27, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive the sum of $4,500 for himself and for an entity, that is, the "D. C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

SIXTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about April 27, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $4,500 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D. C. Committee for Maryland Education", with the intent to influence

Daniel B. Brewster's action, vote and decision on postage rates legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

SEVENTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6) inclusive, of the First Count and incorporates them herein by reference.

(2) On or about July 19, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, corruptly asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself and for an entity, that is, the "D. C. Committee for Maryland Education", from Cyrus T. Anderson and Spiegel, Inc. in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(c)(1) and 2, Title 18, United States Code.

EIGHTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about July 19, 1967, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, corruptly gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, and to an entity, that is, the "D. C. Committee for Maryland Education", with the intent to influence Daniel B. Brewster's action, vote and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(b) and 2, Title 18, United States Code.

NINTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 31, 1968, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendant

Daniel B. Brewster

being a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive the sum of $5,000 for himself from Cyrus T. Anderson and Spiegel, Inc. for and

because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(g) and 2, Title 18, United States Code.

TENTH COUNT:

(1) The Grand Jury realleges paragraphs (1) through (6), inclusive, of the First Count and incorporates them herein by reference.

(2) On or about January 31, 1968, the exact date being unknown to the Grand Jury, within the District of Columbia, the defendants

Cyrus T. Anderson
and
Spiegel, Inc.

directly and indirectly, gave, offered and promised the sum of $5,000 to Daniel B. Brewster, a public official of the United States, acting for and on behalf thereof, in an official function, under and by the authority of the Senate of the United States, for and because of official acts performed by Daniel B. Brewster in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity and in his place of trust and profit; in violation of Sections 201(f) and 2, Title 18, United States Code.

Attorney of the United States in
and for the District of Columbia

A TRUE BILL:

Foreman.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 410114 345

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DEC 31 19[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1025~~ 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

NORMAN P. RAMSEY,

THOMAS WAXTER, JR.,

H. THOMAS HOWELL,

10 Light Street — 17th Floor,
Baltimore, Md. 21202.

Attorneys for Appellee.

The Daily Record Co., Baltimore, Md. 21203

Table of Contents

	PAGE
Statement	2
Questions Presented	4
Argument:	
I. The Criminal Appeals Act, 18 U.S.C. §3731, does not confer jurisdiction over this direct criminal appeal	4
A. The decision below was not based upon the invalidity or construction of the statute upon which the indictment was founded	6
B. The decision below was not one sustaining a motion in bar	8
II. The question sought to be presented on this direct appeal is beyond the scope of this Court's review	12
III. The question sought to be presented on this direct appeal was not expressly passed on below and is not ripe for review by this Court	13
IV. The decision below raises no substantial question not previously decided by this Court	15
V. The question sought to be presented on this appeal is so insubstantial as not to need further argument	21
Conclusion	25
Appendix E	27

Table of Citations

Cases

Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936)	14
Carroll v. United States, 354 U.S. 394 (1957)	5, 8, 9, 10, 12
Coffin v. Coffin, 4 Mass. 1 (1808)	19-20
Dombrowski v. Eastland, 387 U.S. 82 (1967)	7, 18, 21

	PAGE
Kilbourn v. Thompson, 103 U.S. 168 (1880)	16, 20
Moore v. Mississippi, 21 Wall. 636 (1875)	11
Parks v. United States, 355 F. 2d 167 (5th Cir. 1965)	24
Powell v. McCormack, 395 U.S. 486 (1969)	7, 17-19, 21
Sorrells v. United States, 287 U.S. 435 (1932)	11
State v. Linden, 154 La. 65 (1923)	11
Tenney v. Brandhove, 341 U.S. 367 (1951)	16, 20, 25
United Public Workers of America v. Mitchell, 330 U.S. 74 (1947)	14
United States v. Blue, 384 U.S. 251 (1966)	9
United States v. Borden, 308 U.S. 188 (1939)	5, 6, 8, 13
United States v. Carter, 231 U.S. 492 (1913)	8, 14
United States v. Cook, 17 Wall. 168 (1872)	10
United States v. Covington, 395 U.S. 57 (1969)	9
United States v. Fabrizio, 385 U.S. 263 (1966)	6
United States v. Fruehauf, 365 U.S. 146 (1961)	14-15
United States v. Glazer, 129 F. Supp. 285 (D. Del. 1955)	23
United States v. Guest, 383 U.S. 745 (1966)	6
United States v. Halsey, Stuart, 296 U.S. 451 (1935)	10
United States v. Hark, 320 U.S. 531 (1944)	6, 9
United States v. Hastings, 296 U.S. 188 (1935)	8
United States v. Johnson, 383 U.S. 169 (1966)	3, 7, 11-13, 14, 15-23
United States v. Keitel, 211 U.S. 370 (1908)	13
United States v. Kemmel, 188 F. Supp. 736 (M.D. Pa. 1960)	24
United States v. Kissel, 218 U.S. 370 (1910)	13
United States v. Laub, 385 U.S. 475 (1967)	6
United States v. Mason, 213 U.S. 115 (1909)	13
United States v. Mersky, 361 U.S. 431 (1960)	9, 10
United States v. Murdock, 284 U.S. 141 (1931)	9, 11
United States v. Petrillo, 332 U.S. 1 (1947)	6
United States v. Shirey, 359 U.S. 255 (1959)	7

	PAGE
United States v. Sisson, 399 U.S. 267 (1970)	5-6, 8, 9-12
United States v. Spector, 343 U.S. 169 (1952)	6
United States v. Storrs, 272 U.S. 652 (1926)	10
United States v. Weller, No. 77, this Term	5, 10, 12, 25
Wason, Ex parte, 4 Q.B. 573 (1869)	19
Will v. United States, 389 U.S. 90 (1967)	9
Wilson v. United States, 230 F. 2d 521 (4th Cir.), cert. denied 351 U.S. 931 (1956)	24

Constitution and Statutes

United States Constitution:	
Article I, Section 6	2, 4, 6, 7, 9, 11-12, 13, 15-22
Fifth Amendment	9
Criminal Appeals Act, 18 U.S.C. §3731	4-6, 8-12, 13, 14, 15
Federal Bribery Statute, 18 U.S.C. §201	2, 4, 6, 12, 13-14, 18, 21-25
18 U.S.C. §203	23

Miscellaneous

Stern & Gressman, Supreme Court Practice (4th ed. 1969)	13
Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335 (1965)	22-23
House Rep. 748, Comm. on the Judiciary, 87th Cong., 1st Session	25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1025

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm without further argument the judgment of the United States District Court for the District of Columbia on the following grounds:

1. The Criminal Appeals Act, 18 U.S.C. §3731, does not confer jurisdiction over this direct criminal appeal.

2. The question sought to be presented on this direct appeal is beyond the scope of this Court's review.

3. The question sought to be presented on this direct appeal was not expressly passed on below and is not ripe for review by this Court.

4. The decision below raises no substantial question not previously decided by this Court.

5. The question sought to be presented on this appeal is so insubstantial as not to need further argument.

STATEMENT

Because the Government mistakenly characterizes the decision below as one "based upon the invalidity of the statute upon which the indictment is founded," the summary of the case set forth in its Jurisdictional Statement requires some amplification.

On October 9, 1970, the United States District Court for the District of Columbia orally dismissed certain counts of an indictment charging appellee, a former United States Senator, with soliciting and receiving bribes from Cyrus T. Anderson, a lobbying representative of Spiegel, Inc., a large mail order company, in violation of 18 U.S.C. §201 (c)(1) and §201(g). The essence of the charges was that appellee, during his tenure as a Senator, accepted bribes in return for influence in the performance of official acts as a Senator and as a member of the Senate Committee on the Post Office and Civil Service with regard to his action, vote, and decision on postal legislation (Jurisdictional Statement pp. 1-2).

In his motion to dismiss, appellee invoked his claim of legislative immunity under the Speech or Debate Clause of the Constitution (Article I, Section 6).[1]

---

[1] Appellee's motion also asserted that the indictment improperly and inconsistently charged him as being an aider and abettor of himself; that the charges were unconstitutionally vague; that the underlying statutory provisions, 18 U.S.C. §201(c)(1) and §201(g), were unconstitutionally vague and contained no ascertainable standard. Although the District Court did not pass upon any of these contentions, appellee respectfully reserves the right to brief and argue the same in the event probable jurisdiction is noted.

Prior to the hearing and during argument on the motion, the Government represented that its case depended upon inquiry into the appellee's voting record and committee activities, and disclaimed having any proof of illegal conduct not directly related to such legislative acts. The District Court, in colloquy with Government counsel, expressed the opinion that the Speech or Debate Clause precluded judicial inquiry into the motivations underlying legislative activities, either in prosecution of a Senator "accused of improper motives" or otherwise (Appendix E, *infra* at pp. 27-30).

Contrary to the Government's position on this appeal, nothing decided below construes or invalidates any statute. The District Court plainly held, under the admitted circumstances of this case and in line with *United States v. Johnson*, 383 U.S. 169 (1966), that the Speech or Debate Clause provided the appellee with a complete defense to charges arising out of his legislative acts as a Senator:

> "Gentlemen, *based on the facts of this case, it is admitted by the Government* that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> "It is the opinion of this Court that the *immunity* under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, *constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.*
>
> "I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, *as they apply to Senator Brewster.* * * *", (italics added). Appendix A, Jurisdictional Statement.

The order of dismissal entered on November 3, 1970 (Appendix B, Jurisdictional Statement) is based squarely upon the reasons stated in this terse opinion, rather than upon a construction of 18 U.S.C. §201.

On November 4, 1970, the Government noted its direct appeal to this Court (Appendix C, Jurisdictional Statement) under the Criminal Appeals Act, 18 U.S.C. §3731, on the assumption that the decision below was "based upon the invalidity of the statute upon which the indictment is founded." Jurisdictional Statement, p. 2. As an alternative theory of jurisdiction the Government suggested that such decision be viewed as the granting of "a motion in bar." *Id.* p. 3 n. 2.

QUESTIONS PRESENTED

Only two questions are properly before this Court:

Whether the Criminal Appeals Act, 18 U.S.C. §3731, confers jurisdiction over this direct criminal appeal.

Whether the District Court erred in holding the Speech or Debate Clause to constitute a complete defense to a prosecution arising out of a Senator's performance of legislative acts.

On behalf of the appellee it is respectfully submitted that both questions should be answered in the negative.

ARGUMENT

I.

THE CRIMINAL APPEALS ACT, 18 U.S.C. §3731, DOES NOT CONFER JURISDICTION OVER THIS DIRECT CRIMINAL APPEAL.

The Jurisdictional Statement raises — but does not answer — serious questions as to jurisdiction over this direct criminal appeal. Such "appeals by the Government in

criminal cases are something unusual, exceptional, not favored." *Carroll v. United States*, 354 U.S. 394, 400 (1957); see *United States v. Sisson*, 399 U.S. 267, 291 (1970), and authorities cited therein. In view of the difficulties so recently encountered in *Sisson* and posed again this month in *United States v. Weller*, No. 77, this Term, argued December 10, 1970, a two-sentence passing reference is inadequate treatment of the jurisdictional obstacles.

Here the Government invokes two separate provisions of the Criminal Appeals Act, as follows:

> "An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
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> "From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded. * * *
>
> "From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * *"

The Criminal Appeals Act keeps alive the "pleading distinctions that existed at common law" between demurrer and special plea in bar. *United States v. Sisson*, 399 U.S. 267, 307 (1970); see *Carroll v. United States*, 354 U.S. 394, 399-406 (1957). Jurisdiction must be found under one category or the other, for "the exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States v. Borden*, 308 U.S. 188, 192 (1939). See *United States v. Sisson*, *supra* at 291. The Government's attempt here to straddle two separate and distinct categories is itself indicative of insecure jurisdictional footing under either.

A. *The decision below was not based upon the invalidity or construction of the statute upon which the indictment was founded.* The District Court dismissed the indictment, but it does not follow that its decision was "based upon the invalidity or construction of the statute upon which the indictment or information is founded." 18 U.S.C. §3731. The label attached to the decision is not determinative of this Court's jurisdiction. *United States v. Sisson*, 399 U.S. 267, 279 n. 7 (1970). The real test is "the effect of the ruling sought to be reviewed." *Ibid; United States v. Hark*, 320 U.S. 531, 536 (1944).

The decision below did not have the effect of sustaining a demurrer upon the construction or invalidity of 18 U.S.C. §201. Unlike *United States v. Spector*, 343 U.S. 169 (1952), and *United States v. Petrillo*, 332 U.S. 1 (1947), the only cases cited in the Jurisdictional Statement on this point, the District Court did not pass on the validity of the underlying statute, much less declare it to be unconstitutionally vague and indefinite. This is manifestly not a case in which the indictment was held bad as a pleading, see *United States v. Borden*, 308 U.S. 188, 193 (1939), or dismissed for failure to charge an offense. Compare, e.g., *United States v. Fabrizio*, 385 U.S. 263 (1966); *United States v. Guest*, 383 U.S. 745 (1966). Nor does the opinion below contain any discussion of 18 U.S.C. §201 or undertake to construe its provisions. Compare, e.g., *United States v. Laub*, 385 U.S. 475 (1967).

As we see it, the District Court avoided questions of construction or invalidity by finding, on the basis of undisputed facts, that the appellee's "immunity under the Speech and Debate Clause * * * constitutionally shields him from any prosecution for alleged bribery to perform a legislative act." Appendix A, Jurisdictional Statement. It seems obvious that the District Court properly viewed

the protection secured by that Clause as a matter of defense, as did this Court in *United States v. Johnson*, 383 U.S. 169 (1966), when it spoke repeatedly of the "legislative privilege" so afforded. *Id.* 178-181. Later decisions reinforce this defensive aspect. The Clause has been described as the source of "legislative immunity" providing its beneficiaries with "a defense on the merits" and protecting them "from the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 502-503, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). The District Court's concept of the Clause as a "constitutional shield", available to this appellee on the facts, plainly eliminated from this case any necessity for a construction of the underlying statute.

On this appeal the Government seeks to argue, as it did below, that the indictment was "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Jurisdictional Statement, p. 5, quoting dicta in *United States v. Johnson*, 383 U.S. 169, 185 (1966). It contends here, as it did below, that 18 U.S.C. §201 is "narrowly drawn" and within the power of Congress to enact. An excursion into legislative history is suggested.

What the Government overlooks is that this Court "reviews judgments, not arguments assailing them." *United States v. Shirey*, 359 U.S. 255, 261 n. 5 (1959). Certainly the District Court entertained constitutional challenges to §201 and would have been justified, we submit, in declaring that statute void on its face or as applied. The fact remains, however, that the decision actually rendered was not addressed to the statute as such. To assume or infer that the District Court construed or invalidated §201 is not enough. There must be "an expression of opinion in some form as to manifest clearly whether its act proceeded upon a construction of the statute" before this

Court may assume jurisdiction. *United States v. Carter*, 231 U.S. 492, 494-495 (1913). A direct appeal will not lie where the District Court has considered the construction of the statute but has rested its decision on some other ground. *United States v. Borden*, 308 U.S. 188, 193 (1939). Jurisdiction is limited to those cases where the dismissal is based *solely* upon invalidity or construction of the underlying statute. *United States v. Hastings*, 296 U.S. 188, 194 (1935). For this Court to so characterize the decision below "requires a straining that is not permissible in the light of the principles and history concerning criminal appeals" under 18 U.S.C. §3731. *Carroll v. United States*, 354 U.S. 394, 405 (1957).

B. *The decision below was not one sustaining a motion in bar.* In the alternative, and without much vigor, the Government suggests in a footnote that this Court would have jurisdiction under 18 U.S.C. §3731 "if the District Court's action is viewed as the granting of a 'motion in bar'." Jurisdictional Statement, p. 3, n. 2. The point is not pressed any further. We submit that this appeal does not involve a "motion in bar", particularly in view of the narrow technical meaning associated with that term, although the matter is not completely free from doubt. "The case law under the motion in bar provision is very confused, and this Court has not settled on a general approach to be taken in interpreting this provision." *United States v. Sisson*, 399 U.S. 267, 300 (1970).

The confusion is a result of disagreement over the precise scope of the statutory term, "motion in bar". There appear to be two competing schools of thought. It has been said, on one hand, that modern procedural changes have "swept away the old pleas", including the special plea in bar, and that the test of motion-in-bar jurisdiction is "whether the judgment is one which will end the cause

and exculpate the defendant." *United States v. Mersky*, 361 U.S. 431, 441-442 (1960) (Brennan, J., concurring); *United States v. Hark*, 320 U.S. 531, 536 (1944). See also *United States v. Sisson*, 399 U.S. 267, 326-346 (1970) (White, J., dissenting); *United States v. Blue*, 384 U.S. 251, 254 (1966). Guided by this broad view, the Court has permitted the motion-in-bar provision to reach pleas of constitutional privilege. *United States v. Covington*, 395 U.S. 57, 59 n. 2 (1969); *United States v. Blue*, *supra* at 253-254; *United States v. Murdock*, 284 U.S. 141 (1931). These cases deal with pre-trial assertions of the Fifth Amendment privilege against self-incrimination, and it might be argued that their rationale also embraces claims of "legislative privilege" under the Speech or Debate Clause. The analogy is not warranted, we submit. Confusion enshrouds the motion-in-bar provision, this Court observed recently, and Fifth Amendment cases like *Covington* and *Blue* serve only "to add to the uncertainty", especially if a constitutional privilege "is not appropriately raised by a special plea in bar." *United States v. Sisson*, 399 U.S. 267, 300 n. 33 (1970).

That the motion-in-bar provision should not be expanded to cover a claim of legislative privilege is suggested by *United States v. Sisson*, *supra*, which heralds a return to the fundamental concept "that the Criminal Appeals Act should be construed strictly against the Government's right of appeal." *Id.* 286; see *Will v. United States*, 389 U.S. 90, 96-97 (1967); *United States v. Mersky*, 361 U.S. 431, 454 (1960) (Stewart, J., dissenting); *Carroll v. United States*, 354 U.S. 394, 399-400 (1957). *Sisson* is a reminder that Congress defined jurisdiction in terms of procedures existing in 1907, when it first enacted the Criminal Appeals Act, leaving no room for this Court "to give the statutory language a meaning inconsistent with its common law an-

tecedents," *United States v. Sisson*, *supra* at 297. Because the 1948 amendment to the Act worked no substantive changes by translating the old "special plea in bar" into the contemporary "motion in bar," *id.* 292 n. 22, the former term is necessarily restricted to its narrow common law connotation. *Id.* 300 n. 53, and compare dissenting opinion, *id.* 330 n. 5. See *United States v. Mersky*, *supra*, at 456-458 (Stewart, J., dissenting); *Carroll v. United States*, 354 U.S. 394, 399, 405 (1957); *United States v. Halsey, Stuart*, 296 U.S. 451, 452 (1935). As Mr. Justice Holmes remarked in *United States v. Storrs*, 272 U.S. 652, 654 (1926), the Criminal Appeals Act "uses technical words, 'special plea in bar' and we see no reason for not taking them in their technical sense."

The Solicitor General, in a case argued and pending decision by the Court, likewise takes the position that the scope of the motion-in-bar provision is limited solely to the common law concept of a special plea in bar. See Brief for United States, pp. 14-15, *United States v. Weller*, No. 77, this Term. Upon reflection, that position seems clearly inconsistent with the Government's approach to this appeal.

At common law, a special plea in bar was ordinarily used to raise three defenses — *autrefois aquit*, *autrefois convict*, and pardon. *United States v. Sisson*, 399 U.S. 267, 300 n. 53 (1970); *United States v. Mersky*, 361 U.S. 431, 457 (1960) (Stewart, J., dissenting), and authorities cited therein. To these may be added the defense of limitations. *United States v. Cook*, 17 Wall. 168, 179 (1872). Special pleas were thus strictly reserved for (1) matters of confession and avoidance which (2) occurred *after* the events charged in the indictment and (3) not admissible under the general issue. Conversely, a special plea which met only

part of the indictment was bad. *Moore v. Mississippi*, 21 Wall. 636, 639 (1875). So was a special plea raising matter contemporaneous with the offense charged. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (entrapment); *State v. Linden*, 154 La. 65, 97 So. 299 (1923) (self-defense). It was also considered improper for a special plea to set up a defense admissible under the plea of not guilty. *United States v. Murdock*, 284 U.S. 141, 150 (1931). "A special plea in bar is appropriate where defendant claims former acquittal, former conviction or pardon but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *Id.* 151 (citations omitted).

Judged by these technical common law standards, we submit that a defense under the Speech or Debate Clause is not the functional equivalent of a special plea in bar. The element of confession and avoidance is lacking. The defense is founded upon legislative acts which were contemporaneous with the events alleged in the indictment, not subsequent developments as in the case of former jeopardy, pardon, limitations, and the like. Most significant is that the Clause does not inevitably bar indictment and trial in every case in which it is asserted. Prosecution of a legislator is impermissible under the Clause only when it attempts to "draw into question the legislative acts of the defendant member of Congress or his motives for performing them." *United States v. Johnson*, 383 U.S. 169, 185 (1966). Conversely, the Clause does not necessarily shield conduct "that is in no way related to the due functioning of the legislative process." *Id.* 172. Between these extremes lie abundant shades of gray. Whether the protected activity is merely "an incidental part of the Government's case", *id.* 176, or lies at its very roots are questions of fact determinable under the plea of not guilty.

As the *Johnson* decision holds, a prosecution of a Congressman may run its normal course once it has been "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* 185.

If so, the Criminal Appeals Act is inapplicable because "a motion in bar cannot be granted on the basis of facts which would necessarily be tried with the general issue in the case." *United States v. Sisson*, 399 U.S. 267, 301 (1970). It is true that any trial on the general issue was rendered unnecessary here by the complete absence of any dispute as to the operative facts required for decision. This should not alter the basic rule, however. Jurisdiction should not turn upon the extent to which the facts are undisputed or resolved by Government stipulation, cf., *id.* 284-286, "for this would mean the parties and the lower court simply could foist jurisdiction upon this Court." *Id.* 287. "Appeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957).

Inasmuch as the motion-in-bar provision is being accorded full treatment in *United States v. Weller*, No. 77, this Term, argued December 10, 1970, we respectfully suggest that consideration of the jurisdictional issues herein should await a decision in that appeal.

II.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS DIRECT APPEAL IS BEYOND THE SCOPE OF THIS COURT'S REVIEW.

In the event that the Court finds that the decision below sustained a motion in bar, it should decline to entertain the argument advanced in the Jurisdictional Statement, pp. 5-6, to the effect that the federal bribery statute, 18 U.S.C. §201, is "a narrowly drawn statute passed by Con-

gress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966).

It is undeniable that *Johnson* left open the "narrowly drawn statute" question for future consideration in a proper case. But that question, entailing statutory interpretation and analysis of legislative intent, is beyond the narrow scope of review permitted by the Criminal Appeals Act. "The Government's appeal does not open the whole case." *United States v. Borden*, 308 U.S. 188, 193 (1939); *United States v. Keitel*, 211 U.S. 370, 398 (1908). The Criminal Appeals Act vests "this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides." *United States v. Keitel*, *supra*. Any issue dealing with the validity or construction of the statute underlying the indictment is wholly beyond the scope of an appeal of a judgment sustaining a motion in bar. *United States v. Kissel*, 218 U.S. 601, 604 (1910); *United States v. Mason*, 213 U.S. 115 (1909). See Stern & Gressman, *Supreme Court Practice* 43 (4th ed. 1969).

Accordingly, this Court's jurisdiction (assuming its existence) extends only to the specific question whether the shield of the Speech or Debate Clause precluded judicial inquiry into the appellee's legislative acts. Cf., *United States v. Mason*, *supra*.

III.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS DIRECT APPEAL WAS NOT EXPRESSLY PASSED ON BELOW AND IS NOT RIPE FOR REVIEW BY THIS COURT.

Even if there are no jurisdictional obstacles to full review of the federal bribery statute, 18 U.S.C. §201, in the light of the "narrowly drawn statute" question posed in

United States v. Johnson, 383 U.S. 169, 185 (1966), the Court should abstain from considering such issues for the reason that they were not decided below. In essence, the Government is asking this Court in the first instance to review the legislative history, construe the statute, and measure its scope and refinements, despite any expressions of legal judgment by the District Court, and then to declare whether or not Congress has the constitutional power to enact the statute thus construed — again without benefit of a District Court opinion. We cannot regard this as other than a request for an abstract opinion upon the constitutionality of an act of Congress. See *United States v. Carter*, 231 U.S. 492, 493-494 (1913).

Even in cases "confessedly within its jurisdiction", this Court will not pass upon the constitutionality of legislation unless absolutely necessary to a decision of the case or unless the record presents no other ground upon which the case may be disposed of. *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 345-346 (1936) (Brandeis, J., concurring). In *United Public Workers of America v Mitchell*, 330 U.S. 75, 89-90 (1947), the Court said:

> "The power of courts, and ultimately of this Court to pass upon the constitutionality of acts of Congress arises only when the interests of litigants require the use of this judicial authority for their protection against actual interference. A hypothetical threat is not enough."

Where jurisdiction is rigidly circumscribed by the Criminal Appeals Act, as here, it should not be exerted to answer delicate questions as to the construction or validity of Congressional enactments where such questions were not expressly decided below and the case was properly disposed of on some other ground. Regarding the present appeal, "it suffices to say that instances of similar un-

clarity under the Criminal Appeals Act counsels the wisdom of abstaining from reviewing construction of a criminal statute on so cloudy a record as is now before the Court." *United States v. Fruehauf*, 365 U.S. 146, 158 (1961).

IV.

THE DECISION BELOW RAISES NO SUBSTANTIAL QUESTION NOT PREVIOUSLY DECIDED BY THIS COURT.

On the merits, and putting to one side all jurisdictional problems, this appeal gives rise to a single question: whether the Speech or Debate Clause provides a Senator with a complete defense to a criminal prosecution inquiring into his votes upon pending legislation. We submit that this question was answered in *United States v. Johnson*, 383 U.S. 169 (1966), the controlling principles of which were correctly applied below. Indeed, apart from the "narrowly drawn statute" issue, the Government points out no distinction between this case and *Johnson* and we believe none can be drawn. Consequently, if jurisdiction is found to exist, the decision below should be affirmed summarily on the authority of *Johnson* without further briefing or argument.

Johnson involved a conspiratorial attempt to exert influence on the Department of Justice to obtain the dismissal of mail fraud indictments pending against officers of a savings and loan company. As *a part* of the general scheme to influence the Department, Congressman Johnson was charged with accepting payments in return for making a speech on the floor of the House of Representatives. Although the Government did not proceed under the federal bribery statute, as it did here, it sought to prove that the payments "were made simply to 'buy' the Congressman." *Id.* 383 U.S. at 172.

At trial the bulk of the evidence dealt with Johnson's financial transactions with other conspirators and with his contacts with the Department. But there was also evidence as to the speech and his motives for giving it, thus inviting the sort of inquiry proscribed by the Speech or Debate Clause.

> "The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech." *Id.* 176-177.

Reviewing the Clause in historical perspective, and in the light of its two prior encounters with it,[2] this Court concluded "that the legislative privilege will be read broadly" and will not be destroyed by a "claim of an unworthy purpose." *Id.* 180. Thus Johnson's conduct in giving the speech, however reprehensible because motivated by renumeration from private sources, was within the scope of the privilege. *Ibid.* The accusation that the speech "was improperly motivated * * * is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *Ibid.*

It is true that the Court in *Johnson* limited its holding to the specific facts before it, as follows:

> "We hold that a prosecution under a general criminal statute dependent upon such inquiries necessarily

[2] *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1880).

contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Id.* 184-185.

However, even if *Johnson* is considered a "limited holding", *id.* 186 (Warren, C.J., concurring), the decision below did not go beyond its precepts. Although the appellee's prosecution has a different statutory genesis, it is conceptually on all fours with *Johnson*. Here again is a member charged with accepting alleged payments in return for being influenced in the performance of legislative acts. Whereas *Johnson* involved a bribe-induced speech, the present case is grounded upon votes in the Senate and in Committee upon pending legislation. Under his plea of not guilty, the appellee's motives in considering such legislation and voting thereon were placed in issue and would have been subjected to judicial examination had not the District Court applied the *Johnson* rationale to voting as well as speech-making.

On the latter point there can be no doubt. As this Court said recently, the Speech or Debate Clause is not confined to words spoken in debate. "Committee reports, resolutions, and *the act of voting are equally covered*, as are things generally done in a session of the House by one of

its members in relation to the business before it'." *Powell v. McCormack*, 395 U.S. 486, 502 (1969) (italics added).

Nor is this case an appropriate vehicle for resolving whether the federal bribery statute, 18 U.S.C. §201, is a "general criminal statute" or whether it is instead "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966). We find no warrant in this *Johnson* dicta for a supposition that Congress, by enactment of a "narrowly drawn statute", may carve out an exception to the Speech or Debate Clause so as to expose a Congressman's voting habits to judicial scrutiny and criminal sanctions. *Johnson* itself indicates that the legislative privilege was born of a desire "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *Id.* 181. *Powell v. McCormack*, 395 U.S. 486, 502 (1969). The very purpose of the privilege confines it to legislative activity. Within that limitation, the privilege should be regarded as absolute. This would seem to be the very essence of the Court's post-*Johnson* pronouncements:

> "It is the purpose and office of the doctrine of legislative immunity, having its roots as it does in the speech and debate clause of the Constitution, that legislators engaged in the sphere of legitimate legislative activity should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (citations omitted).
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> "Our cases make it clear that the legislative *immunity* created by the Speech or Debate Clause performs an important function in representative government. It *insures* that legislators are free to represent the interests of their constituents *without fear that they will be later called to task in the courts for that repre-*

sentation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969) (italics added).

We fail to appreciate the need for further clarification.

Moreover, the interrelation between federal bribery prosecutions of Congressmen and the Speech or Debate Clause hardly presents a novel question for this Court. *Johnson* itself was a "speech for compensation" case, *id.* 383 U.S. at 171, in which payments "were made simply to 'buy' the Congressman." *Id.* 172.[3] In oral argument in *Johnson* the Government dealt with the case in terms of Congressional power "to make it a crime triable in court for a Congressman to take money to make a speech." *Id.* 186 n. 16. In reply to the Government contention that the Speech or Debate Clause does not cover prosecutions founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe," *id.* 182, this Court reminded the Government that "the language of the Constitution is framed in the broadest terms", *id.* 182-183, and quoted the statement in an English case[4] "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House." *Id.* 183.[5] No further reminders to the Government should be necessary here.

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[3] Chief Judge Sobeloff, comparing the conspiracy charge against Congressman Johnson with the federal bribery statute, noted "the close relation between the two." *United States v. Johnson*, 337 F. 2d 180, 189 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

[4] *Ex parte Wason*, 4 Q.B. 573, 576 (1869) (Lush, J.).

[5] To a like effect is *Coffin v. Coffin*, 4 Mass. 1, 27 (1808), wherein the Court, similarly spoke of an absolute privilege admitting of "no exceptions;

> "I will not confine it to delivering of an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; and I would define the article, as securing to every member exemption from prosecution, for everything done or said by him, as

The shield of a Congressman's voting habits from outside inquiry "is one manifestation of the 'practical security' for insuring the independence of the legislature." *United States v. Johnson*, 383 U.S. 169, 179 (1966). The political process makes it inappropriate for the judicial and executive branches to pass upon the motives of legislators. Unlike judges and administrative officials, Congressmen are frequent recipients of donations from a variety of sources. They must obviously look to contributors for financial support. Votes favorable to past and potential supporters are inevitable. Given the accepted definition of bribery — payment to influence action — and the susceptibility of Congressmen to allegations of being influenced by financial donors, the Speech or Debate Clause extends an impenetrable constitutional shield from prosecution to Congressmen engaged "in the sphere of legitimate legislative activity." *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951).

> "In times of political passion, dishonest or vindictive motives are readily attributed to conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.* 378.

Few provisions of our Constitution are as sparsely litigated as the Speech or Debate Clause. *United States v.*

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a representative, in the exercise of the functions of that office; without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules." *Coffin* is said to be "the most authoritative case in the country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight." *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). It was more recently cited with approval in *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951), and in Judge Sobeloff's opinion in *United States v. Johnson*, 337 F. 2d 180, 188, 190 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

Johnson, 383 U.S. 169, 179 (1966). And yet, in the five years since *Johnson*, it has twice been the subject of thoroughgoing consideration. See *Powell v. McCormack*, 395 U.S. 486 (1969); *Dombrowski v. Eastland*, 387 U.S. 82 (1967). Now the Government seeks to bring up the Clause for a fourth reading in a situation differing little from *Johnson*. We do not believe such a new reading to be necessary.

V.

THE QUESTION SOUGHT TO BE PRESENTED ON THIS APPEAL IS SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

We now turn to the issue which the Government urges upon this Court, i.e., whether the Speech or Debate Clause bars a prosecution of a Senator "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *United States v. Johnson*, 383 U.S. 169, 185 (1966). The question was left open in *Johnson* "for consideration when the case arises", *ibid.* According to the Government, this prosecution under the federal bribery statute, 18 U.S.C. §201, presents the issue left undecided in *Johnson*. It argues that Congress may constitutionally enact a statute providing for judicial sanctions against a member who accepts a bribe for performance of a legislative act; that §201 reflects a proper exercise of such assumed constitutional power; that the statute should be construed to authorize prosecutions of Congressmen thereunder free from the constraints imposed by the Speech or Debate Clause. Jurisdictional Statement, pp. 5-6.

Without minimizing the abstract importance of the question posed in *Johnson*, we maintain that this is not an appropriate occasion for deciding it. As discussed herein, *supra* at pp. 6-8, 12-15, the decision below was not based on

the invalidity or construction of §201 and, in any event, did not rule on the Government's contentions. Thus abstention by this Court, we submit, is both necessary and desirable. Should this Court find both the jurisdiction and the inclination to pursue such contentions, however, it will find them devoid of substance in the context of this appeal.

The Government's position necessarily assumes §201 to be a "narrowly drawn statute" within the contemplation of *Johnson*. Because the position falls with its initial premise, there is no present need to deal with such intriguing but presently irrelevant issues as the power of Congress to regulate the conduct of its members; the delegability of such power to the courts; the extent to which a member's voting habits may be subjected to outside scrutiny without running afoul of the Clause; the construction of §201 as an exception to the Clause; the constitutionality of §201 as thus construed.

Although *Johnson* does not define what is meant by "a narrowly drawn statute", the unmistakable connotation is one of precision. The footnote reference (*id.* 185 n. 15) to pages 347-348 of the Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L.J. 335 (1965), confirms this impression. When the Court posed the "narrowly drawn statute" question as a possible alternative to an absolute prohibition on bribery prosecutions, it evidently had the following passage in mind:

> "The possibility of a tight definition of bribery which would *sharply reduce discretion afforded under existing statutes* indicates that there need not be an absolute immunity to bribery prosecutions." *Ibid.* (italics added).

Without pausing to contest the notion that Congress can impair the constitutional privilege of its members by tight

definitions of bribery, we reject as unfounded any suggestion that §201 is defined with such precision as to qualify as a "narrowly drawn statute". It should be noted that "existing statutes" were not placed within the acceptable category. For example, the Note condemned a companion statute, 18 U.S.C. §203, punishing conflicts of interest, as constitutionally vague for reasons equally applicable to §201.

> "[It] allows conviction for an agreement to receive compensation even when the bribed service has not been performed and even when consideration has not passed. Thus the statute leaves the jury free to convict essentially upon evidence of intent only. Standards of proof of intent are rather uncertain, and a Congressman might fear legitimately that honest conduct could be misinterpreted. Every conversation with a constituent interested in having his Congressman support legislation or urge change in executive policy could be suspect." *Id.* 347.

Turning to §201 itself, the Note declared that its provisions "present vagueness problems similar to those encountered under the conflict of interest provision." *Id.* 347 n. 76.

It is obvious that neither the Note nor *Johnson* contemplated §201 as a "narrowly drawn statute". Congress was invited to enact new legislation containing a "tight definition of bribery" so as to overcome vagueness problems depicted in the Note. Congress has not yet responded and §201 remains on the books as a wide-ranging "general criminal statute", *United States v. Johnson*, 383 U.S. 169, 185 (1966).

Historically, the federal bribery statute has been construed "in the broadest possible manner." *United States v. Glaser*, 129 F. Supp. 285, 286 (D. Del. 1955). See also

Parks v. United States, 355 F. 2d 167, 168 (5th Cir. 1965). Neither receipt of compensation nor performance of actual services appear essential to conviction thereunder. See e.g., *United States v. Kemmel*, 188 F. Supp. 736 (M.D. Pa. 1960), aff'd 295 F. 2d 712 (3rd Cir. 1961), cert. denied 368 U.S. 988 (1962). It is the very antithesis of a "narrowly drawn statute".

> "If this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many broadening words are used in the statute: 'in *any* official capacity,' '*any* department or agency,' 'on *any* question, matter, cause, or proceeding', which may *at any time* be pending, 'which *may* by law be brought before him.' Consider the number of disjunctive or alternative persons, actions, or situations referred to: 'an officer *or* employee of, *or* person acting for or on behalf of the United States', 'any department *or* agency,' 'decision *or* action', 'any question, department or agency', 'decision *or* action', 'any question, matter, cause, *or proceeding* which may at any time be pending, or which may by law be brought before him,' 'in his official capacity, *or* in his place of trust *or* profit.' There is no verbal requirement that the matter be pending before the official at the time of the bribe. It is sufficient if it 'may *at any time* be pending', or if it '*may* by law be brought before him' at some time in the future.
>
> "Certainly, in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit. To this statute, (and its companion, 18 U.S.C.A. §201), the federal courts have properly given an extremely liberal interpretation." *Wilson v. United States*, 230 F. 2d 521, 524 (4th Cir.), cert. denied 351 U.S. 931 (1956) (italics in original).

When §201 was enacted as part of the 1962 revision, it did not restrict the broad sweep of these interpretations:

"The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application." House Rep. 748, Comm. on the Judiciary, 87th Cong., Ist Sess. 17 (1961).

A reading of §201, its definitions and substantive language, and its interpretation by the federal courts readily negates any supposition that it can be viewed as "narrowly drawn" under any reasonable definition. Nor can we believe that Congress meant by enacting §201 to restrict the traditional freedom of Congressmen acting within their sphere of legislative activity. Cf., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Reliance by the Government upon a general criminal statute so lacking in specificity and so susceptible of unconstitutional application, with a consequent chilling effect upon legislative speech and debate, underlines the insubstantial nature of this appeal and counsels its summary dismissal.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed or, in the alternative, that the judgment of the District Court be affirmed. We further suggest that consideration of the jurisdictional issues discussed herein be postponed pending decision of *United States v. Weller*, No. 77, this Term.

Respectfully submitted.

NORMAN P. RAMSEY,

THOMAS WAXTER, JR.,

H. THOMAS HOWELL,

Attorneys for Appellee.

December, 1970.

APPENDIX E

Extract from the Transcript of Proceedings in United States of America v. Daniel B. Brewster, Criminal No. 1872-69, United States District Court for the District of Columbia, Before the Honorable George L. Hart, United States District Judge October 9, 1970, pages 29-33.

* * * * * *

(29) (The Court) You know, to me an interpretation of the law is supposed to be common sense and all these nice differentiations sometimes escape me.

But we have the Constitution, which in the Speech and Debate Clause definitely intends to protect Senators and Congressmen from being questioned as to why as a Senator or a Congressman they voted a certain way, made a certain speech in the Congress or voted a certain way in Committee, or I should think it might certainly extend to arguing with other Senators why they should vote for their point of view and whatnot.

Now, surely the framers wished to protect these members from being constantly heckled and accused of improper motives, certainly as far as the criminal law is concerned, for what they did.

Now, if that is the purpose of it aren't we in (30) this case, in effect, or isn't the Government in this case, in effect, questioning Senator Brewster for his legislative actions in committee and on the floor? That is what I am having trouble getting around.

Now, there are some circumstances that maybe it is impossible to stop Representatives and Senators from being rascals. I am not speaking of Senator Brewster, nothing so far has been proven against him, I am speaking generally. Except, of course, the will of the people, which is the final judge in these cases.

I don't know, but I must admit this thing gives me a lot of trouble and seeing the trouble I am in, what can you do to cast some light in my mind?

(Mr. Baron) [Government Counsel] Your Honor, I submit this: I don't want to pretend it is a clearcut question. It is terribly troublesome and it is one the Supreme Court didn't reach in Johnson. Obviously they left it open for you to struggle with or for Judge Thomsen to struggle with in Maryland.

I submit that if all we had were the Speech and Debate Clause in the Constitution, if there were no section 201 passed by the Congress, the very body which has the right to claim the privilege under the Speech and Debate Clause—

(The Court) Congress can't change the Speech and Debate Clause except by submitting a Constitutional Amendment.

(31) (Mr. Baron) I submit, Your Honor, they have the power, however, to regulate their own membership and we submit they have the power to delegate the power to regulate their own membership.

And that if there were no Section 201 or its equivalent, I would say that we are stymied, it is a license to steal. But Congress having exercised that power, Congress having, in effect, said to the Judiciary and to the Executive you have the authority by virtue of our legislation to investigate, to try Congressmen who may be guilty of corrupt activities, I submit that 201 is the mandate for proceeding.

(The Court) We are now just talking about corrupt activity in your legislative capacity. I wouldn't have any trouble with the allegations of the Dowdy matter as to accepting money to try to affect the Executive Branch of the Government or the Judicial, should such a thing happen. But I must admit I am having trouble with whether Congress itself has the power.

If Congress does not have the power they can't give it to us.

Does Congress itself have the power to question why a man voted a certain way, why he argued a certain way,

why he made the representations he made in executive committee and whatnot, does Congress itself have that power?

It isn't enough just to say that Congress has given (32) it to the courts. Have they got it to give?

(Mr. Baron) Your Honor, I submit that they do. I think that Powell certainly reflects that, whatever else Powell may say, which probably raises more questions than it answers. I think Powell does reflect that they do have the right to discipline their members and to regulate the conduct of their members and I submit—

(The Court) They have got a right to regulate certain conduct of a member and of course under one section of the Constitution, by a two-third vote, presumably subject to Supreme Court opinion, they have a right to remove a man from the Senate almost without giving any cause; but that could be done without questioning the manner in which he voted or manner in which he spoke or the manner in which he acted in his purely legislative capacity.

This thing gives me a lot of trouble.

(Mr. Baron) Your Honor, I would not begin to pretend it is not a troublesome point. It is one which I assume some day the Supreme Court is going to resolve for us, more or less.

But I do submit, Your Honor, that Congress does have this inherent power to inquire, yes, even into the integrity of its own process, and it does have the power to delegate that should the Congress determine in its wisdom that (33) it, as a body, is simply not capable of performing that function which it has inherent the power to perform. They have the power to delegate that to the most appropriate forum of all, the Federal Judiciary. And should it be abused by the Federal Judiciary, Congress can revoke that power.

(The Court) That is not the question. The question becomes simple. Does Congress itself have the power to question the speech and debate of one of its members with the

necessary legislative matters that go along with it? If it has, it can give it to the courts. If it doesn't, it can't give what it doesn't have.

Well, tell me this: does the indictment in any wise allege that Brewster did anything not related to his purely legislative functions?

(Mr. Baron) We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that.

* * * * * * *

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No. ~~1025~~ 70-45

In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY MEMORANDUM FOR THE UNITED STATES

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States.

OCTOBER TERM, 1970

No. 1025

UNITED STATES OF AMERICA, APPELLANT

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REPLY MEMORANDUM FOR THE UNITED STATES

The Motion to Dismiss or Affirm contests, *inter alia*, this Court's jurisdiction over this appeal pursuant to 18 U.S.C. 3731. This point calls for a brief response, in contrast to appellee's argument on the merits—which, at this stage of the case, simply reinforces our

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showing that the substantive question involved is both important and unsettled.

Appellee contends that the second paragraph of Section 3731 is not applicable to this case because the district court did not hold the bribery statute invalid in its entirety, but only that it could not be applied against members of Congress who accept bribes in exchange for legislative acts. But it is plain that the paragraph is invoked by a decision that a statute cannot constitutionally be applied to a class of cases. This Court so held last Term in *United States* v. *Knox*, 396 U.S. 77. In *Knox*, the district court had dismissed an indictment under 18 U.S.C. 1001 for misstatements in wagering tax forms, on grounds of self-incrimination, but did not, of course, purport to invalidate that statute as applied to other situations. This Court found jurisdiction under the second paragraph, because the district court's ruling "amount[ed] to a holding that § 1001, as applied to this class of cases, is constitutionally invalid". 396 U.S. at 79, note 2.

Since this Court's jurisdiction in this case is thus unassailable without regard to the "construction of the statute" and "motion in bar" questions in issue in *United States* v. *Weller*, No. 77, this Term, there is no

reason to defer action on our jurisdictional statement pending decision in *Weller*.[1]

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1971.

---

[1] It is also plain that this Court has jurisdiction over the present appeal under the motion-in-bar clause of Section 3731 as strictly construed. Appellee's indictment was dismissed on the basis of the "new matter," presented by his plea of congressional privilege, that the district court found would forever bar appellee's prosecution; thus, this is a clearcut case of confession and avoidance, exactly as in *United States* v. *Blue*, 384 U.S. 251. This case does not touch the motion-in-bar question in *Weller*, where our argument against this Court's jurisdiction is based on the fact that the dismissal was based not on new matter but on a conclusion that the face of the record showed that there was no offense at all because of a defect in the underlying administrative proceeding. Our *Weller* brief concedes, consistent with the legislative history, that a claim of immunity is a motion in bar (p. 15).

Although the Criminal Appeals Act has been significantly amended by Title III of the Omnibus Crime Control Act of 1970, P.L. 91-644, approved January 2, 1971 (with the result that a future case of this nature would be appealable—like all criminal cases that the government can appeal—only to the court of appeals), that amendment specifically provides that it does not apply to cases "begun in any district court" before its effective date. The amendment is set forth, for the Court's information, in the Appendix to this memorandum.

APPENDIX

Omnibus Crime Control Act of 1970, PL 91-644, approved January 2, 1971.

* * * * *

TITLE III—CRIMINAL APPEALS

SEC. 14. (a) Section 3731 of title 18, United States Code, is amended—

(1) by striking out the first eight paragraphs and inserting in lieu thereof the following:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court, dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.":

(2) by striking out the word "or" in the ninth paragraph and inserting in lieu thereof a comma, and inserting "or order" following the word "judgment" in the same paragraph;

(3) by striking out the last two paragraphs and inserting in lieu thereof a new paragraph as follows:

"The provisions of this section shall be liberally construed to effectuate its purposes."

(b) The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section.

* * * * *

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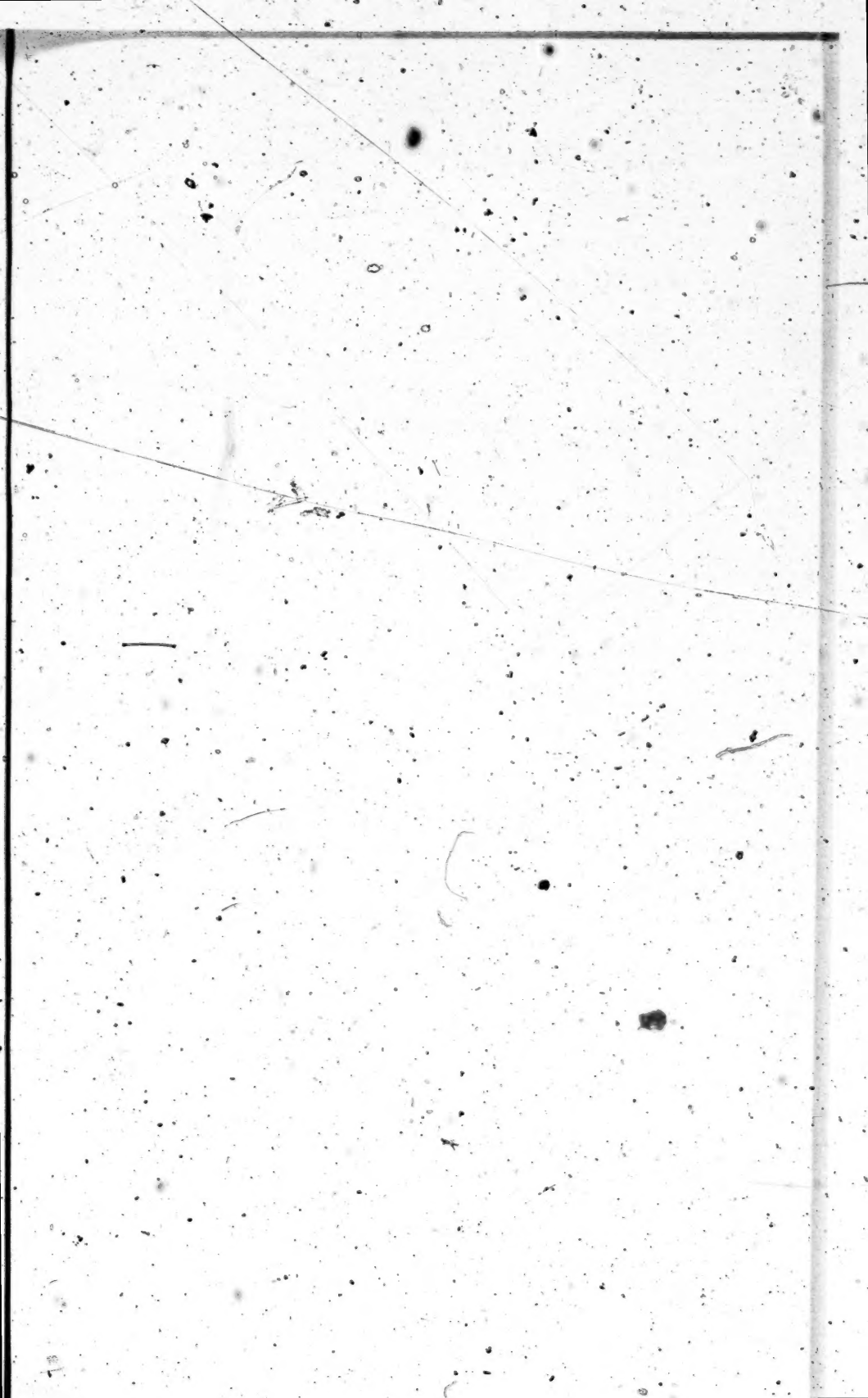

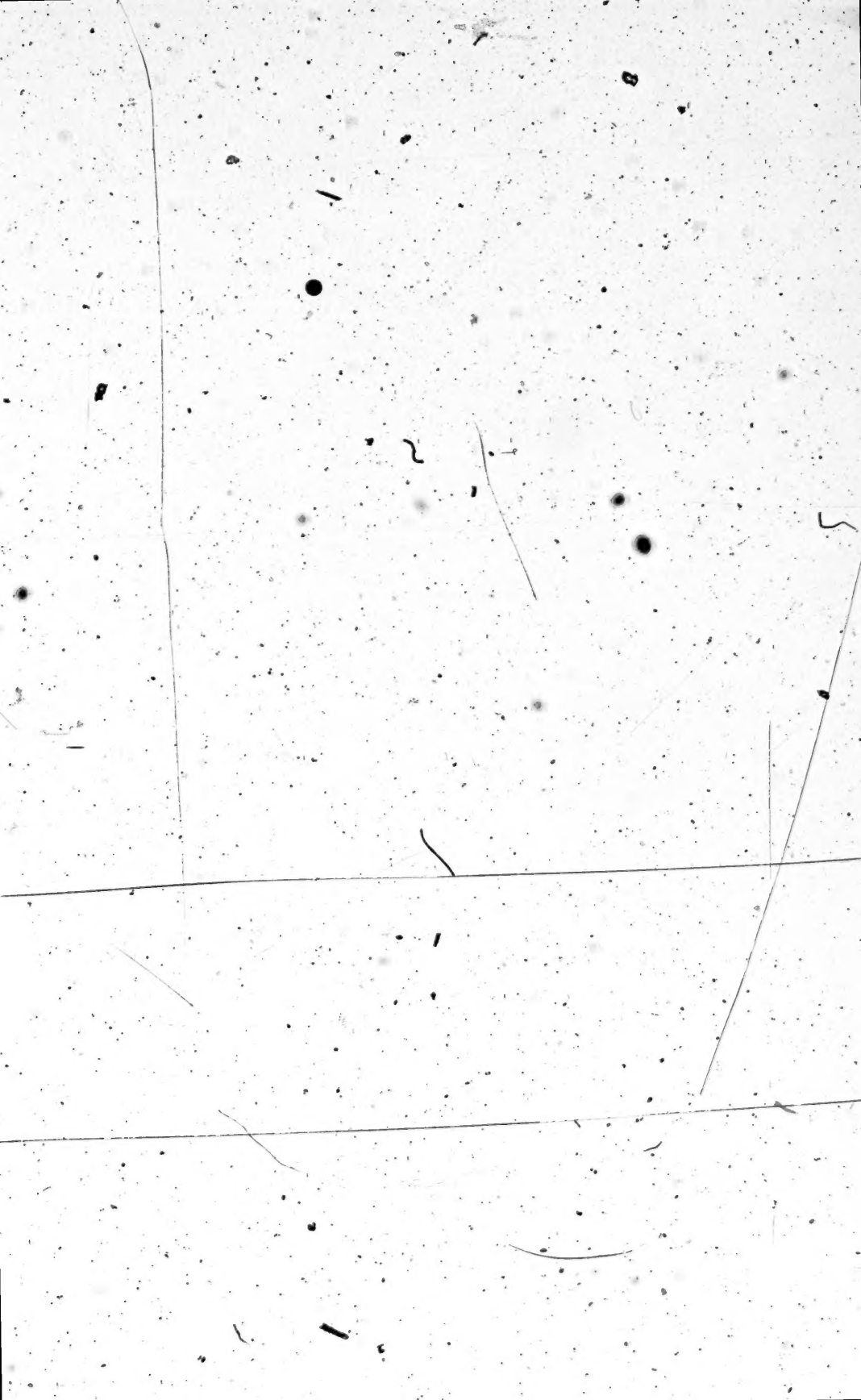

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OCTOBER TERM, 1970

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Constitutional and statutory provisions involved	2
Statement	3
Summary of argument	5
Argument:	
I. The court has jurisdiction over this appeal	7
II. Congress has the constitutional power, properly exercised in the statute here involved, to provide for the judicial trial and punishment of a member who takes a bribe in exchange for the performance of a legislative act	10
A. The decision in *United States* v. *Johnson*	10
B. Pertinent background of the Speech or Debate Clause	12
C. No constitutional provision bars Congress from making it a crime for a member to accept a bribe	23
D. The statute involved in this case is a valid exercise of congressional power	29
Conclusion	33

CITATIONS

Cases:

Anderson v. *Dunn*, 6 Wheat 204	22, 26
Burton v. *United States*, 202 U.S. 344	25, 32
Chapman, In re, 166 U.S. 661	26, 27
Coffin v. *Coffin*, 4 Mass. 1	19

Cases—Continued

Page

Jurney v. *MacCracken*, 294 U.S. 125 26
Kilbourn v. *Thompson*, 193 U.S. 168 ..... 11, 24, 26
Marshall v. *Gordon*, 243 U.S. 521 26
May v. *United States*, 175 F. 2d 994, certiorari denied, 338 U.S. 830 32
Myddelton v. *Wynn*, 125 Eng. Rep. 1339 15
Powell v. *McCormack*, 395 U.S. 486 11, 17, 20, 23, 24
Regina v. *Bunting*, 7 Ont. Rept. 524 15
Regina v. *White*, 13 S.C.R. 322 15
Rex v. *Boston*, 33 C.L.R. 386 15
Rex v. *Pitt*, 3 Burr. 1335 15
Tenney v. *Brandhove*, 341 U.S. 367 21
United States v. *Brown*, 381 U.S. 437 ..... 20, 21, 22, 27–28
United States v. *Bryan*, 339 U.S. 323 27
United States v. *Irwin*, 354 F. 2d 192, certiorari denied, 383 U.S. 967 31
United States v. *Johnson*, 383 U.S. 169 ..... 6, 10, 11, 12, 13, 20, 24, 29, 31
United States v. *Jorn*, 400 U.S. 470 9
United States v. *Kenner*, 354 F. 2d 780, certiorari denied, 383 U.S. 958 31
United States v. *Knox*, 396 U.S. 77 ..... 5, 8, 9
United States v. *National Dairy Corp.*, 372 U.S. 29 31
United States v. *Vuitch*, No. 84, this Term, decided April 21, 1971 31
United States v. *Weller*, No. 77, this Term, decided February 24, 1971 ..... 5, 7, 9
Watkins v. *United States*, 354 U.S. 178 ... 16, 22, 26
Williamson v. *United States*, 207 U.S. 425 ... 15

Constitution and statutes:
United States Constitution:
Article I, Section 1 ..... 12, 22
Article I, Section 2, cl. 2 23
Article I, Section 5 ..... 23, 25
Article I, Section 6 (Speech or Debate Clause) 2
Article I, Section 8 ..... 12, 22
Article I, Section 9, cl. 3 (Bill of Attainder Clause) 27
First Amendment 31
Act of February 26, 1853, c. 81, 10 Stat. 170 28
Criminal Appeals Act, 18 U.S.C. (Supp. V) 3731 ..... 4, 5, 7, 9
1970 Amendment, 84 Stat. 1890 7
Rev. Stat. 1782, 13 Stat. 123 25
12 Stat. 577 28
2 U.S.C. 192 25
18 U.S.C.:
201 ..... 10, 28, 29
201(a) 2, 30
201(b) 4
201(c) 3, 8
201(c)(1) 3, 4, 30
201(e) 3
201(g) 3, 4, 8, 30
201(i) 3
18 U.S.C. 203 28
18 U.S.C. 371 10
18 U.S.C. 1001 8
Bill of Rights of 1689, Sectio 19 15
Massachusetts Constitution of 1780 (Part The First, Act, XXI) 19
New Hampshire Constitution of 1784, Part I (The Bill of Rights) 19

Miscellaneous:

	Page
Bowyer; *Constitutional Law of England* (Second ed. 1846)	15
Clarke, *Parliamentary Privilege in the American Colonies* (1943)	18, 19
30 Cong. Globe 288–297	28
60 Cong. Globe 3260–3261	28
Cushing, *Legislative Assemblies* (1856)	14
III Hinds, *Precedents of the House of Representatives* (1907)	24
Kirby, *Congress and the Public Trust* (1970)	24
Luce, *Legislative Assemblies* (1924)	14
1 May, *The Constitutional History of England* (1889)	16
May, *Law of Parliament* (Seventh ed. 1873)	15
May, *The Law, Privileges, Proceedings and Usage of Parliament* (Fourteenth ed. Campion 1946)	14
Note, *The Bribed Congressman's Immunity From Prosecution*, 75 Yale L. J. 335	31
Oppenheim, *Congressional Free Speech*, 8 Loyola L. Rev. 1	28
1 and 2 Poore, *Constitutions and Charters* (1878)	19
Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691 (1926)	18
Senate Misc. Doc. 67, 52d Cong., 2d Sess., *Senate Election Cases*	24
Senate Misc. Doc. 278, 53d Cong., 2d Sess., *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States Relating to Their Powers and Privileges Respecting Their Members and Officers* (1894)	24, 27
Taswell-Langmead, *English Constitutional History* (Eleventh ed., Plucknett, 1960)	13, 14, 16

Miscellaneous—Continued

The Federalist (Bourne ed. 1914):

	Page
No. 48	20, 21, 22
No. 49	21
No. 56	20, 21
No. 73	21
Wittke, *The History of English Parliamentary Privilege* (1921)	16, 17
Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. of Pa. L. Rev. 960	28

In the Supreme Court of the United States

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No. 1025

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court did not deliver a written opinion. Its oral opinion is contained in the Appendix at page 33.

JURISDICTION

The judgment of the district court was entered on November 3, 1970 (A. 33–34). A notice of appeal to this Court was filed on November 4, 1970 (A. 34–35). On March 1, 1971, this Court postponed consideration of the question of jurisdiction to the hearing on the merits (A. 35). For the reasons set forth in part I of the Argument, *infra*, we submit that this Court has jurisdiction over the appeal under 18 U.S.C. 3731.

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction under the Criminal Appeals Act (as applicable prior to its recent amendment) to entertain a direct appeal from a district court decision dismissing an indictment on the ground that the statute upon which it is based is invalid as applied to all members of Congress.

2. Whether (a) the speech or debate clause or any other constitutional provision prohibits Congress from enacting a statute providing for the judicial trial and punishment of members who accept bribes in exchange for the performance of legislative acts and (b) if no constitutional prohibition exists, whether the statute here in issue constitutes a valid exercise of Congressional power.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 6 of the Constitution provides in pertinent part:

> ***for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place.

18 U.S.C. 201 provides in pertinent part:

> (a) For the purpose of this section:
>
> "public official" means Member of Congress [the Delegate from the District of Columbia], or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by

authority of any such department, agency, or branch of Government, or a juror;

* * * * *

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

* * * * *

(c) Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for:

(1) being influenced in his performance of any official act * * * [shall be guilty of an offense].[1]

* * * * *

(g) Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him; * * * [shall be guilty of an offense].[2]

---

[1] A violation of 18 U.S.C. 201(c)(1) is punishable by imprisonment for not more than fifteen years and a fine of $20,000 or three times the monetary equivalent of the thing of value constituting the bribe. See 18 U.S.C. 201(e).

[2] A violation of 18 U.S.C. 201(g) is punishable by imprisonment for not more than two years and a maximum fine of $10,000. See 18 U.S.C. 201(i).

Prior to its amendment effective January 2, 1971 (84 Stat. 1890), 18 U.S.C. (Supp. V) 3731, provided in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> * * * * *

STATEMENT

Appellee, a former United States Senator, was charged in five counts of a ten-count indictment with the solicitation and acceptance of bribes in violation of 18 U.S.C. 201(c)(1) and (g) (A.1–7).[3] The essence of the charges was that, during his tenure as a Senator and in his capacity as a member of the Senate and the Senate Committee on the Post Office and Civil Service, appellee solicited and accepted bribes in

[3] Appellee was named in counts 1, 3, 5 and 7 as having violated Section 201(c)(1) and in count 9 with violating Section 201(g). The remaining counts of the indictment charged Cyrus Anderson and Spiegel, Inc., with offering and giving the bribes in violation of 18 U.S.C. 201(b).

amounts totaling $24,000 from Cyrus T. Anderson, the Washington, D.C. lobbying representative of Spiegel, Inc., a large mail order firm, in return for his being influenced in the performance of official acts with regard to postage rate legislation.

On November 3, 1970, the United States District Court for the District of Columbia (Hart, J.) granted appellee's pre-trial motion to dismiss the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act" (A. 33).

SUMMARY OF ARGUMENT

I. This Court has jurisdiction of this appeal under the Criminal Appeals Act, 18 U.S.C. (Supp. V) 3731. Indeed, its authority to hear this case rests upon two independent provisions of that Act.

The order of the district court dismissing the indictment was thus "based upon the invalidity * * * of the statute" within the meaning of the second paragraph of Section 3731, as construed in *United States* v. *Knox*, 396 U.S. 77, 79 n. 2. The order is also appealable as a "motion in bar" under the fourth paragraph of the jurisdictional statute. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971.

II. We thus turn to the question posed by the merits—whether the indictment of appellee under the instant bribery statute violated the speech or debate clause or any other constitutional provision. We argue that it did not.

We first trace the relevant history of the clause and urge that it amply supports the view that Congress has the constitutional power itself to punish bribe taking members. Our conclusion in this regard is fully buttressed by the history leading to the adoption of the clause in England and its application by the Colonial Assemblies. It is also clear that the founders did not intend by that provision to render that power the exclusive prerogative of Congress. On the contrary, the contemporary evidence shows that it was recognized that Congress in the exercise of its legislative authority could utilize the courts to try and punish corrupt members. We further stress that no other constitutional provisions point the other way; we argue that the contrary is true.

We further contend that paramount considerations of policy strongly support the clear constitutional authority. We point to a variety of significant reasons in this respect—not least among them the fact that a legislative body by its very nature and purpose is not geared to try a criminal charge, particularly against a member, where popular passions rather than impartial justice may carry the day.

We finally argue that the statute under which appellee was indicted was within the "narrowly drawn" test articulated in *United States* v. *Johnson*, 383 U.S. 169, 185. It is thus sufficient in our view to meet the *Johnson* requirement if a statute gives reasonable notice of the conduct proscribed—as the one here involved clearly does—and represents a deliberate congressional decision announced in a criminal statute—

as is also the case here—that a member who violates the public trust should be tried in a court of law. In sum, it is our position that the decision below has unduly restricted the authority of Congress to define, by legislation, the circumstances which warrant punishment of its members.

ARGUMENT

I. THE COURT HAS JURISDICTION OVER THIS APPEAL

The Court's order of March 1, 1971 postponed consideration of the question of jurisdiction "to the hearing of the case on the merits" (A. 35). Accordingly, we turn first to that question, and urge that the Court's jurisdiction in this case is fully sustainable under either of two discrete provisions of the Criminal Appeals Act, 18 U.S.C. (Supp. V) 3731.[4]

A. The first applicable provision is the second paragraph of Section 3731. That paragraph provides, in pertinent part, that a direct appeal to this Court may be taken from the decision of a district court dismissing an indictment where the decision is "based upon the invalidity * * * of the statute upon which the indictment * * * is founded." This Court held last Term that an appeal is authorized under this

[4] The 1970 amendment to the Criminal Appeals Act, 84 Stat. 1890—which we printed as an Appendix to our Reply Memorandum in response to appellee's Motion to Dismiss or Affirm—is not applicable to the present appeal since by its own terms that amendment does not apply to cases "begun in any district court before its effective date," *i.e.*, January 2, 1971. See *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971, slip op. p. 1, n. 1.

language to review a decision that a statute cannot constitutionally be applied to a particular class of cases, irrespective of its admitted validity in other contexts. *United States* v. *Knox*, 396 U.S. 77. In that case, an indictment under 18 U.S.C. 1001 for misstatements in wagering tax forms had been dismissed prior to trial on grounds of self-incrimination; the district court did not, of course, purport to invalidate the statute—which is of broad general application in other situations. This Court found jurisdiction, saying (396 U.S. at 79, n. 2):

> The District Court sustained the claim of privilege not on the basis of facts peculiar to this case but on the basis of its conclusion that the Fifth Amendment provides a defense to any prosecution under § 1001 based on misstatements on a Form 11–C. This amounts to a holding that § 1001, as applied to this class of cases, is constitutionally invalid. The generality of the impact of the District Court's holding appears to us to render our jurisdictional holding *a fortiori* compared to analogous jurisdictional holdings in such cases as *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282 (1921); *Fleming* v. *Rhodes*, 331 U.S. 100, 102–104 (1947); *Wissner* v. *Wissner*, 338 U.S. 655 (1950); *Department of Employment* v. *United States*, 385 U.S. 355, 356–357 (1966). * * *

The situation in the present case is the same. The district court did not dismiss the charges against appellee because of any facts special to this case, but rested its decision upon the broader ground that the underlying statutes (18 U.S.C. 201(c)(1) and (g))

could not be constitutionally applied against *any* member of Congress who accepts a bribe in exchange for legislative conduct. The district court accordingly invalidated these statutes as applied to a particular definable class; under *Knox*, the jurisdiction of this Court is therefore properly invoked.

B. Alternatively, the fourth paragraph of Section 3731 establishes the Court's authority to entertain the instant appeal. That provision permits a direct appeal to this Court from a district court decision "sustaining a motion in bar, when the defendant has not been put in jeopardy." This pre-trial dismissal came before any jury was impanelled and thus before appellee was "put in jeopardy." See *United States* v. *Jorn*, 400 U.S. 470, 473–478. The only remaining question is whether the order sustained a motion in bar. That it did is confirmed by this Court's recent holding in *United States* v. *Weller*, No. 77, this Term, decided February 24, 1971. In *Weller*, the Court stressed that the statutory phrase "motion in bar" "must be taken to mean whatever was meant by a 'special plea in bar' in the Act as originally passed in 1907" (slip op. at 5). The Court stated (*id.* at 6):

> A characteristic common to all these definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged and that the acts were a crime. Rather, it claimed that nevertheless he could not be prosecuted for his crime because of some extraneous factor. A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.
>
> Our decisions are consistent with this reading of the "motion in bar" provision. In early cases

> under the section, the most familiar plea in bar interposed the statute of limitations. * * * In other cases defendants have claimed immunity because of prior self-incriminatory testimony or a statutory grant of immunity. *United States* v. *Blue*, 384 U.S. 251; *United States* v. *Hoffman*, 335 U.S. 77, 78; *United States* v. *Monia*, 317 U.S. 424. * * *

The present case falls within this interpretation. Appellee's motion to dismiss was premised on the proposition that, whether or not he had committed the acts constituting a crime under 18 U.S.C. 201, he was immune from prosecution because he had a congressional privilege. This is therefore a classic case of confession and avoidance—and the avoidance was based on the "extraneous factor" of constitutional privilege. Thus, the district court sustained a motion in bar within the intent of the Criminal Appeals Act.

In sum, this case is properly here on direct appeal, and we accordingly turn to the merits.

II. CONGRESS HAS THE CONSTITUTIONAL POWER, PROPERLY EXERCISED IN THE STATUTE HERE INVOLVED, TO PROVIDE FOR THE JUDICIAL TRIAL AND PUNISHMENT OF A MEMBER WHO TAKES A BRIBE IN EXCHANGE FOR THE PERFORMANCE OF A LEGISLATIVE ACT

A. THE DECISION IN UNITED STATES V. JOHNSON

This Court decided in *United States* v. *Johnson*, 383 U.S. 169, that the speech or debate clause bars a prosecution under a general criminal statute (in that case for conspiracy under 18 U.S.C. 371) which calls into question the legislative conduct of a member of

Congress.[5] At the same time, however, the Court was most careful to exclude from the reach of its decision prosecutions bottomed not upon a criminal provision of general applicability as in *Johnson*, but instead upon a statute in which Congress, in the exercise of its power to legislate, had expressly authorized judicial prosecution and conviction of its members for corrupt practices. As to the latter class of prosecutions, the Court stated (383 U.S. at 185):

> * * * [W]ithout intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.

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[5] *Johnson* involved a Congressman's conviction for conspiring to impair lawful government functions by accepting a bribe to make a speech on the floor of the House of Representatives. The speech was charged as part of the conspiracy (383 U.S. at 184) and extensive evidence concerning its contents and Jonhson's motive in giving it was introduced at trial (383 U.S. at 173–176).

In his opinion concurring on this aspect of the case, Mr. Chief Justice Warren (joined by Justices Douglas and Brennan) read the Court's decision as a "limited holding * * * that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech or Debate Clause" (383 U.S. at 186–187).

Whatever the precise limits of *Johnson*, we do not contend that the clause protects only speech. "Committee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it.'" *Powell* v. *McCormack*, 395 U.S. 486, 502, quoting in part from *Kilbourn* v. *Thompson*, 103 U.S. 168, 204.

This case presents the issue left open in *Johnson*: whether Congress may constitutionally enact a statute specifically providing for judicial trial and punishment of a member who accepts a bribe in exchange for performance of legislative acts. We will contend in the remainder of this Brief that Congress has such power, that its exercise is compatible with controlling constitutional provisions, and that the statute in issue here constitutes a proper exercise of the legislative power which is reserved to Congress under Article I Sections 1 and 8.

B. THE PERTINENT BACKGROUND OF THE SPEECH OR DEBATE CLAUSE

Our brief in the *Johnson* case (No. 25, October Term, 1965, pp. 19–24), outlined the historical roots and the development of the speech or debate clause. This Court's opinion in that case also canvassed that history (383 U.S. at 173–183). In the Court's words (*id.* at 178), the clause:

> * * * was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators [footnote omitted]. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. * * *

We agree with this assessment of the history and nature of the legislative privilege as far as it goes. But the present inquiry—which was specifically

avoided in the *Johnson* decision—requires a further examination of the relevant history as a guide to the intentions of the Framers in the present context. In particular, it requires consideration of the correlative development of the legislative power to punish legislators' improprieties, as well as the abuses of legislative power during the Eighteenth Century.

1. At the close of the Seventeenth Century, as a corollary of Parliament's success in obtaining the right of free speech and debate, it also acquired the unchallenged power to punish offenses by its members against the order and integrity of its proceedings. Indeed the exercise of such authority was deemed to be an essential attribute of Parliamentary supremacy and was an integral part of the struggle for free speech and debate.

One of the earliest recorded instances of the exercise of this institutional authority occurred in 1576. Peter Wentworth, a member of the House of Commons, had verbally attacked the Queen in a manner deemed offensive by the House. A committee of all privy councillors was appointed to examine him and, pursuant to its report, Wentworth was committed to the Tower. Wentworth again incurred the displeasure of the House when he and others introduced a motion suggesting that the Speaker or a member could not interrupt another member's speech. For this offense, Wentworth was again imprisoned.[6] Subsequently, in

[6] After he secured the Queen's pardon and acknowledged his fault at the bar of the House, Wentworth was ultimately released from custody. Taswell-Langmead, *English Constitutional History* (Eleventh ed., Plucknett, 1960) 314.

1694 (five years after the incorporation of freedom of legislative speech and debate in the English Bill of Rights) one Lord Falkland, a member of Commons, was found guilty of accepting 2,000 pounds from the Crown in return for his votes and was committed to the Tower of London during the pleasure of the House.[7] Perhaps an even more notorious case involved the Speaker of the House of Commons, Sir John Trevor, who in 1695 was found guilty of charges of bribery.[8]

By the early Eighteenth Century Parliament had succeeded in establishing its almost exclusive authority to try members accused of taking bribes in connection with their official responsibilities.[9] This power to impose sanctions upon members was obviously a necessary corollary of the right of untrammeled legis-

[7] Luce, *Legislative Assemblies* 401 (1924).

[8] *Id.*, at 402. Another instance of punishment for corrupt behavior occurred in 1714, when Sir Robert Walpole, a member of the House of Commons, was expelled and imprisoned by the House on charges of corruption. Taswell-Langmead, *supra*, at 584. Bribery was frequently brought to the attention of the House during the course of its investigation of disputed elections, and when the evidence indicated an election had been secured by corrupt means the House normally directed the attorney general to commence a prosecution. Cushing, *Legislative Assemblies*, 217, 251, 258–268, 423 (1856). See also May, *The Law, Privileges, Proceedings and Usage of Parliament* (Fourteenth ed. Campion 1946), 51, 103, 104, 428–432, and 438–440.

[9] There is some indication that this power was not totally exclusive. One English historian has suggested that a member of Parliament who was found guilty of bribe-taking not only forfeited his seat, but was also "liable to prosecution in the same manner as bribed voters, and persons corrupting them

lative debate; otherwise a single legislator could, with impunity, disrupt or dishonor the legislative processes the privilege was designed to protect. It is clear that Parliament at no time doubted its plenary authority to regulate the conduct of its members; misconduct was regarded as a breach of privilege and treated as a contempt.[10] In short, the immunity afforded by the privilege of speech and debate offered an offending member no protection whatsoever against the authority of Parliament to question and punish his behavior.

The developing *lex parliamenti* soon become subject to abuse, and during the Eighteenth Century Parliament sought to expand its privileges to encompass matters that would not normally be deemed to be

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* * *." Bowyer, *Constitutional Law of England*, 90 (Second ed., 1846). This treatise was cited with approval by this Court in discussing the legislative privilege from arrest in *Williamson* v. *United States*, 207 U.S. 425, 442.

Apparently, Bowyer's view was predicated on the ruling of Lord Mansfield in *Rex* v. *Pitt*, 3 Burr. 1335 (1767), that bribery at election of members of Parliament was always a crime punishable at common law. See also, *Myddelton* v. *Wynn*, 125 Eng. Rep. 1339, 1344 (Ex. Ch. 1745). This notion was the basis of later Commonwealth cases that a legislator was amenable to trial and punishment by the courts for taking a bribe in connection with his official duties. See, *e.g.*, *Rex* v. *Boston*, 33 C.L.R. 386 (1923, Australia); *Regina* v. *White*, 13 S.C.R. 322 (1875; N.S.W.); *Regina* v. *Bunting*, 7 Ont. Rept. 524 (1885, Canada). See note 22, *infra*, p. 22.

[10] The privilege of speech or debate was thus invariably asserted in a manner which reserved to the legislative body the power to impose sanctions upon individual members. See, *e.g.*, Section 19 of the Bill of Rights of 1689, declaring that "the freedom of speech or debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament." May, *Law of Parliament* (Seventh ed. 1873), 113, 115–116.

within the legislative sphere.[11] As this Court described this development in *Watkins v. United States*, 354 U.S. 178, 188, see also *id.* at 189–191 both Houses of Parliament "claimed absolute and plenary authority over their privileges," the right to declare "what those privileges were," what "new privileges were occasioned," and "what conduct constituted a breach of privilege." And the legislative privileges were subject to use or sale for the personal gain of members.[12]

Moreover, it was not long before the Crown devised means to use the parliamentary privileges indirectly in its own efforts to control legislation. "Votes which were no longer to be controlled by fear, were purchased with gold."[13] An example of this abuse was

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[11] It thus could authoritatively be stated that in the Eighteenth Century Commons "could take cognizance of almost any offense under the *lex parliamenti*, punish it as a breach of privilege, and thus invade the field of jurisdiction that rightly belonged to the judges of the *lex terrae*." Wittke, *The History of English Parliamentary Privilege* (1921) 200; see also Taswell-Langmead, *supra*, 321–322, 580–582.

[12] For example, resting upon its basic privilege that its members were free from civil arrest or molestation, Commons successfully asserted the power to punish trespass on the estates of members, theft of their goods or those of their servants and the arrest of their servants. Additionally, members of Commons and their servants were declared to be outside the reach of the common law courts during the time that Parliament was sitting. This led to the sale of "protections" issued under the seal of particular members, providing in effect that named persons were servants of the member and should be free from arrest, imprisonment and molestation, during the term of Parliament. See Wittke, *supra*, at 56–57, 63–67; Taswell-Langmead, *supra*, 321–322, 580–582.

[13] 1 May, *The Constitutional History of England* 300 (1889). For a fuller discussion of the technique of government by corruption in Eighteenth Century England, see the Brief for the

revealed in the celebrated case of John Wilkes. After Wilkes had successfully invoked the parliamentary privilege in defense against the Crown's attempt to prosecute him for publication of an allegedly seditious document, the royally controlled Parliament found that his acts constituted a breach of the privilege. Wilkes' battle with both the Crown and Parliament lasted some twenty years before he won an ultimate victory. One scholar has described the lesson of Wilkes' case as follows:

> [Wilkes] had directed popular attention to the royalty-controlled House of Commons, and pointed out its unrepresentative character, and had shown how easily a claim of privilege might be used to sanction the arbitrary proceedings of ministers and Parliament, even when a fundamental right of the subject was concerned.[14]

2. By the time the colonial assemblies began to function in this country, the authority of Parliament to regulate the conduct of its members had become established tradition, and the colonial legislatures followed the path made by Parliament. The power to punish members was assumed as part of the legislative privilege, and only two assemblies appear to have specifically requested such power in their petitions for privilege to their governors. Such a request was included in the Speaker's Petition of the New York assembly in 1717, and a similar request was made by the

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United States in *Johnson*, No. 25, October Term, 1965, pp. 26–30.

[14] Wittke, *supra*, at 22; *id.* at 115–120. See also this Court's discussion of Wilke's case in *Powell* v. *McCormack*, 395 U.S. 486, 527–531.

speaker of the North Carolina assembly during the same period; even these two colonial assemblies had, however, previously exercised the power without seeking formal recognition.[15]

Members of the colonial legislatures were frequently punished by censure, admonition, fine or imprisonment. For example, the Maryland assembly in 1642 subjected those of its members who did not appear at the legislature by a specified time to a penalty, and other assemblies frequently imposed fines upon members for unexcused absence from the house. Fines were sometimes regarded as insufficient and were supplemented by the arrest and censure of an offending member.[16]

At the same time, the colonial assemblies were also guilty of the types of abuse that had infected Parliament's exercise of its authority.[17] In this setting, it is hardly surprising that clashes between governors and colonial assemblies occurred: the former seeking to

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[15] Clarke, *Parliamentary Privilege in the American Colonies* (1943) 73–74. In addition to specific rules governing proceedings, some assemblies enacted more general regulations providing for the discipline of members by a variety of penalties, including censure, fine and imprisonment. Clarke, *supra*, at 184 and, generally, at 173–204.

[16] See Clarke, *supra*, at 177, 181–182. In Connecticut, as early as 1639, a fine of ten pounds could be levied for an infraction of the legislative rule against divulging assembly secrets or delivering legislative papers without permission; in North Carolina the penalty could be expulsion. *Id.* at 182. In Virginia, drunkeness of a member was punishable by a fine of 100 pounds of tobacco. *Id.* at 181.

[17] See, *e.g.*, Clarke, *supra*, particularly at pp. 15–22, 29–58, 72, 93–131, 237–261; see also Potts, *Power of Legislative Bodies to Punish for Contempt*, 74 U. of Pa. L. Rev. 691, 780 (1926).

restrain what was deemed to be legislative invasion of Executive authority; the latter seeking to press their power as far as possible.[18]

3. When the framers adopted the speech or debate clause, they were fully aware of this total development—both the benefits of uninhibited legislative speech and the dangers of unfettered and corrupt use of legislative power. They undeniably welcomed and encouraged legislative freedom unencumbered by interference from the other branches of government, for such freedom benefitted the constituency being represented.[19] On the other hand, they were acutely troubled that this power could be grossly abused and corrupted—as had been the case in England and in some instances in the colonial assemblies; they desired no repetition of such excesses in the federal Congress. The Wilkes affair was fresh in their minds (see

[18] For example, in New York in 1727, the assembly and the governor became embroiled in a sharp controversy which was temporarily resolved by dissolution of the assembly. During the next assembly, the treatment of members at the hands of the governor was vigorously protested. One member was imprisoned for insisting he was accountable only to the assembly for any act done in it. By resolutions, the assembly declared that this act of imprisonment was the most extreme violation of its privileges. Clarke, *supra*, at 95, see also 93–131, 237–261.

[19] The Massachusetts Constitution of 1780 had thus provided: "The freedom of deliberation, speech and debate, in either house of the legislature, is so essential *to the rights of the people* that it cannot be the foundation of any accusation or prosecution, action or complaint, in any other court or place whatsoever" [Part The First, Art. XXI, emphasis added]. See 1 Poore, *Constitutions and Charters*, 956, 959 (1878). See for a similar formulation the New Hampshire Constitution of 1784, Part I (The Bill of Rights), Article XXX, 2 Poore, *supra*, 1280–1283. See also *Coffin* v. *Coffin*, 4 Mass. 1, 27, 28.

Powell v. *McCormack, supra,* 395 U.S. at 530–531) as were the activities of George III in gaining control of Commons in the Revolutionary War by financial and other means.[20] Nor did they overlook the real danger that unless there was some internal restraint, Congress might emulate Parliament and certain of the colonial assemblies, by seeking to utilize the legislative power to encroach upon other Departments, thus "passing the limits assigned to it."[21]

These concerns coalesced in the adoption of the speech or debate clause. The central aim of course, was to retain the critical, indeed indispensable, guarantee of legislative independence. The immunity conferred by the clause was intended to prevent legislative intimidation by, or accountability to, other branches of government. Immunity from such potential harassment, whatever its form, "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation," *Powell* v. *McCormack, supra,* 395 U.S. at 503. Moreover, the clause serves "the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States* v. *Johnson, supra,* 383 U.S. at 178. Yet the framers were

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[20] One of the framers thus pointedly noted that it was "notorious, that [legislators] are more frequently the representatives and instruments of the executive magistrate, than the guardians and advocates of the popular rights." *The Federalist,* No. 56, (Hamilton or Madison) p. 387 (Bourne ed. 1914).

[21] See *United States* v. *Johnson, supra,* 383 U.S. at 178, quoting Madison in *Federalist* No. 48. See also *United States* v. *Brown,* 381 U.S. 437, 443–444.

also alert to the fact that government by legislative corruption or legislative overreaching was no fanciful danger; and that unless kept within legitimate bounds legislative power could sap the integrity of the governmental process. Their writings repeatedly expressed this fear of legislative excess. Madison pointed out that "[t]he legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." He believed that specific obstacles had to be erected against the possible abuse of power by the Congress. See *The Federalist*, No. 48, pp. 338–340 (Bourne ed. 1914). See also, *The Federalist*, Nos. 49, 56, 73. In the same vein, Jefferson wrote to Madison in 1789 that "[t]he tyranny of the legislatures is the most formidable dread at present, and will be [so] for long years." See *Tenney* v. *Brandhove*, 341 U.S. 367, 375 n. 4; *United States* v. *Brown*, *supra*, 381 U.S. at 443–444, and note 17.

It is against this framework that the purpose of the speech or debate clause must be evaluated. In providing that speech or debate in either House "shall not be questioned in any other Place," it was thus not simply meant that Congress could impose sanctions on the unruly legislator or on one who violated its rules of behavior. It was also meant that Congress could itself punish a corrupt and venal member—that it could exercise a power that had always been one of the essential factors in the overall struggle for legislative freedom of debate. Indeed, the Founders could rely upon contemporary history in concluding

that the danger of bribery was of real and immediate concern. Correspondingly, the Founders were intimately aware from immediate history that the legislative power was subject to easy abuse and that "barriers had to be erected to ensure that the legislature did not overstep the bounds of *its* authority and perform the functions of the other departments." *United States* v. *Brown, supra,* 381 U.S. at 444 (emphasis in the original). In sum, the Framers clearly recognized that Congress would have the authority to punish its members for acts of bribery connected with legislative duties. It is equally sound to conclude that the Framers had no objection to, and perhaps even deemed desirable, congressional use of its legislative authority under Article I Section 1, and the "necessary and proper clause", Article I Section 8, to enact a statute specifically providing for a trial in the courts of a member who takes a bribe; such a statute avoids the likelihood of a trial influenced by popular clamor and the lack of impartiality necessarily inherent in a legislative body where "all the passions which actuate a multitude" may be felt. See *The Federalist,* No. 48, pp. 383–384, quoted in *United States* v. *Brown, supra,* 381 U.S. at 443, 444.[22]

[22] Accordingly, there is no basis for reading the speech or debate clause as embodying any concept—comparable to the *lex parliamenti*—that Congress has exclusive authority to punish members for taking bribes. The *lex parliamenti*—Parliament's broad authority to punish offenses to its dignity or integrity in many instances to the exclusion of the courts (but see note 9, p. 15, *supra*) was not taken over into American jurisprudence. See *Watkins* v. *United States*, 354 U.S. 178, 192. See also, *Anderson* v. *Dunn*, 6 Wheat. 204.

C. NO CONSTITUTIONAL PROVISION BARS CONGRESS FROM MAKING IT A CRIME FOR A MEMBER TO ACCEPT A BRIBE

Our discussion so far has indicated that the freedom of legislative speech or debate necessarily includes the unfettered power of Parliament itself to punish a member for violations of its rules, including the acceptance of a bribe in exchange for legislative conduct: the adoption of the speech or debate clause in the Constitution underscored that this authority was given to Congress. If any further support for this proposition is necessary[23] one need only refer to Article I, Section 5 of the Constitution[24] and the recent decision of this Court in *Powell* v. *McCormack*, *supra*.

The Court held in *Powell* that the House of Representatives is without power to *exclude* any member-elect who has met the constitutionally required standing qualifications contained in Article I, Section 2, clause 2, rejecting the claim that what transpired in that case was tantamount to expulsion under Article I, Section 5. What is especially pertinent here is the fact that in the course of its opinion the Court made it clear that "Congress has an interest in preserving its institutional integrity, * * * [which] in most cases * * * can be sufficiently safeguarded by the exercise of its

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[23] The district court here indicated doubt as to Congress' power in this regard, apparently reasoning that Congress could not punish its own members for bribery and hence could not grant that authority to the courts (see A. 27).

[24] That provision reads: "* * * Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two-thirds, expel a member."

power to punish its members for disorderly behavior and, in extreme cases, * * * expel a member with the concurrence of two-thirds" (395 U.S. at 548). See also, *e.g., Kilbourn* v. *Thompson*, 103 U.S. 168. Indeed, that power has been utilized in the past—albeit with a light hand—to deal with corrupt members and those who otherwise violate their legislative responsibilities.[25]

With its own power incontestable, the question remains whether Congress may by statute empower the regular judicial tribunals if—as was not the situation in the conspiracy statute involved in *Johnson*—it defines specifically the circumstances which warrant punishment of its members and fixes the appropriate penalties. We perceive no constitutional impediment to the enactment of such a statute by Congress in the exercise of its basic legislative power; the only question is whether Congress has expressly done so.

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[25] See Senate Misc. Doc. 278, 53d Cong., 2d Sess., *Digest of Decisions and Precedents of the Senate and House of Representatives of the United States Relating to their Powers and Privileges Respecting their Members and Officers* (1894), especially at pp. 85–190. See also, III Hinds' *Precedents of the House of Representatives*, 145–165 (1907); Kirby, *Congress and the Public Trust*, 202–230 (1970); Senate Misc. Doc. 67, 52d Cong., 2d Sess., *Senate Election Cases*, 713–759.

While punishment of its members has been limited to censure, fine, or expulsion (see, *e.g.*, Kirby, *supra*, 202–210; III Hinds, *supra*, 795–860, 1114–1142), we see no reason why imprisonment would not also be an appropriate remedy. See *Kilbourn* v. *Thompson*, *supra*, 103 U.S. at 189–190: "* * * [T]he Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment * * *."

In *Burton* v. *United States*, 202 U.S. 344, this court affirmed the conviction of a United States Senator for agreeing to receive and actually receiving compensation for services in relation to a mail fraud proceeding pending before the Post Office in violation of Section 1782 of the Revised Statutes, 13 Stat. 123. Although no speech or debate issue was involved, it was urged that the statute was invalid because it conflicted with Article I, Section 5, by which "the Senate is made * * * the sole judge of the qualifications of its members, and, with the concurrence of two-thirds, may expel a Senator from that body" (202 U.S. at 366). The Court squarely rejected this claim; it held that "there is no necessary connection between the conviction of a Senator of a public offense prescribed by statute and the authority of the Senate in the particulars named" and that "it was never contemplated that the authority of the Senate to admit [a member] to a seat in its body * * * or its power to expel him after being admitted, should, in any degree, limit * * * the authority of Congress to enact" statutes otherwise within its legislative competence (202 U.S. at 367). This decision is particularly important in the instant context since it holds that judicial prosecution of a Member of Congress under a conflict-of-interests statute is constitutionally valid.[26]

This Court has upheld analogous legislation (now 2 U.S.C. 192, originally enacted in 1857)[26] providing for the trial in a court of law of a witness whose

[26] It is noteworthy that the statute involved in *Burton* was passed some 3 years after the precursor of the statute involved in this case. See *infra*, p. 28.

behavior during the course of a congressional investigation was contumacious [27] (*In re Chapman*, 166 U.S. 661, 671–672; [28] *Jurney* v. *MacCracken*, 294 U.S. 125, 151–152) even though Congress had been held to have inherent authority to punish a nonmember for contempt. Thus, it is clearly established that Congress may enact a statute providing for judicial enforcement of its inherent powers.

As we have argued, there is no room for doubt that Congress can punish its own members for corrupt practices in the performance of legislative acts; it may also, we submit, constitutionally make such behavior a crime triable in a court. As we have shown in the preceding section, such a use of its legislative authority is fully consistent with the purposes of the speech or debate clause; by definition it is no impairment of the power of Congress.

Sound considerations of policy support the authority

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[27] This legislation was directly prompted by the refusal of a newspaperman to divulge to the House of Representatives the names of those Congressmen who he claimed in the press were soliciting bribes on matters pending in the House. See *Watkins* v. *United States*, 354 U.S. 178, 207–208 n. 45.

[28] The Court held in *In re Chapman*, *supra*, that even though Congress could itself have punished the contempt, it could enact a statute in this regard "for carrying into execution the powers vested in Congress and each House thereof." 166 U.S. at 671.

While Congress does not possess the scope of the power enjoyed by the English Parliament to punish nonmembers for contempt, it has been held to have that power under certain circumstances. See *Anderson* v. *Dunn*, 6 Wheat. 204, 233; *Kilbourn* v. *Thompson*, 103 U.S. 168; cf. *Marshall* v. *Gordon*, 243 U.S. 521, 543–544 (dictum).

of Congress to provide for judicial trials of corrupt members. To begin with, legislative machinery is not geared to resolve the sensitive issues of guilt and innocence, particularly where that determination in large measure requires inquiry into what transpired outside of the legislative chamber. Indeed, the 1857 contempt statute discussed above was adopted in part to avoid the difficulties necessarily inherent in a legislative trial. Cf. *In re Chapman*, *supra* at 671.[29] Another practical reason (perhaps of greater significance) supporting a judicial trial is that a conviction thus obtained permits "the imprisonment of a contemnor beyond the expiration of the current session of Congress." *United States* v. *Bryan*, 339 U.S. 323, 327.

The most fundamental policy consideration militating against a legislative trial, however, is that such a trial is apt to be influenced by political factors extraneous to considerations of justice in a particular case. In reviewing the underlying purpose of the Bill of Attainder Clause, this Court has remarked "that the

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[29] The report of the 53d Congress in 1894, containing an exhaustive analysis of Congressional investigations of charges against members reflects the frustration of both Houses with the interminable delays occasioned by these investigations and the resulting delay of passing upon more pressing public business. This report indicates that experience showed Congress to be ill suited to perform the functions of a judicial tribunal. See Senate Misc. Doc. 278, *Digest of Decisions and Precedents of the Senate and House of Representatives Relating To Their Powers and Privileges Respecting Their Members and Officers*, 53d Cong., 2d Sess., particularly at pp. 23–25, discussing the investigation of Senator John Smith's alleged involvement in the Aaron Burr conspiracy.

Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons," *United States* v. *Brown*, 381 U.S. 437, 445, and authorities cited at note 19.[30]

In enacting the original precursor to 18 U.S.C. 201 and 203 (Act of February 26, 1853, c. 81, 10 Stat. 170, 171),[31] Congress indicated awareness of this danger; indeed the argument in favor of the legislation was that it was necessary so that Congress might regulate its conduct in response to an established rule of law rather than "the capricious judgment of friend or foe."[32] No mention was made during the debate of the speech or debate clause; much less was there any suggestion that this legislation would in any way conflict with or undercut the protections afforded by the

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[30] As one recent commentator has pointed out, "Congress itself has been notoriously slow and exceedingly reluctant to apply its own palliatives to situations of legislative slander. In the entire course of this country's existence only eighteen attempts were made by Congress to purge itself of what Congress considered 'unhealthy' elements." Oppenheim, *Congressional Free Speech*, 8 Loyola L. Rev. 1, 27; see also Yankwich, *The Immunity of Congressional Speech—Its Origin, Meaning and Scope*, 99 U. Pa. L. Rev. 960, 972–973 (1951).

[31] As it read in 1853 the statute made it a crime for a member of Congress to accept a bribe "to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity * * *."

[32] See 30 Cong. Globe 288–297, particularly at 291. See similarly the debate on the subsequent statute of 1862, 12 Stat. 577, 60 Cong. Globe 3260–3261.

clause. Congress was concerned precisely with avoiding the dangers of legislative abuse which so troubled the Framers, and it was to that end that judicial trials of allegedly corrupt members were authorized by this statute. The result was to insure greater protection to the public interest and the institutional interest of Congress, as well as the interest of the Congressman involved. His conduct is subject to censure only if a grand jury returns an indictment charging betrayal of the public trust, and the impartiality of the judicial tribunal protects him from a politically motivated judgment. Concomitantly, the use of the judicial process promotes public confidence in the integrity of Congress since such a procedure evinces a deliberate legislative decision to try one of its own in a nonpolitical forum over which it has no control.

D. THE STATUTE INVOLVED IN THIS CASE IS A VALID EXERCISE OF CONGRESSIONAL POWER

We submit that 18 U.S.C. 201—the statutory provision under which appellee was indicted—meets the constitutional standard suggested in *Johnson, supra,* 383 U.S. at 185 of "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." Thus this statute does not suffer from the crucial defect that *Johnson* found in the general conspiracy statute, since it leaves no room whatever for doubt that Congress has intended expressly to exercise its legislative power in this specific area of bribery of a member.

We have already discussed the fact that in adopting the precursors to the present statute, Congress

expressed no doubt of the legitimacy of its authority to do so, nor, as far as our research has shown, did any member express concern that the legislation would encroach upon the legislative freedom of speech or debate. After the passage of more than a hundred years, the same congressional acceptance appeared when Congress comprehensively revised the bribery, graft and conflict-of-interest laws in 1962, so as to incorporate the prohibition on bribery of its own members expressly in the general prohibitions relating to "public officials" (18 U.S.C. 201(a), *supra*, p. 2). Once again, there was no suggestion that Congress thought that such legislation might in any way restrict the freedom of congressional speech or action; and it was under this statutory framework that appellee was indicted. In short, if the view of Congress as to the scope of its own powers is a relevant consideration in assessing the constitutional validity of the instant statute—as it undoubtedly is in the present context where the exclusivity of congressional power is in issue—the present legislation passes muster.

The bribery statute not only expresses the specific congressional intent to utilize its legislative authority to provide judicial trials with respect to unlawful acts of members and reflects the view of Congress that this serves the purposes of the constitutional grant of legislative autonomy; it also defines with precision the crime itself. Section 201(c)(1) prohibits a Congressman from accepting anything of value for the performance of an official act and section 201(g) in effect simply prohibits the Congressman from soliciting or

accepting a bribe. There can be no question that these provisions meet the traditional standards for assessing vagueness;[33] attacks on that basis have been uniformly rejected. *United States* v. *Kenner,* 354 F. 2d 780 (C.A. 2), certiorari denied, 383 U.S. 958; *United States* v. *Irwin,* 354 F. 2d 192 (C.A. 2), certiorari denied, 383 U.S. 967. Moreover, if it is contended that these provisions are overbroad in a First Amendment sense (see *United States* v. *Johnson, supra,* 383 U.S. at 182, note 12), then we can conceive of no statute directed at punishing a member of Congress for taking a bribe that would be constitutionally valid. What the statute punishes is, of course, not the making of any speech or the performance of any legislative act, but the taking or soliciting of a bribe.[34]

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[33] As said in *United States* v. *National Dairy Corp.,* 372 U.S. 29, 32–33:

"Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed. *United States* v. *Harris,* 347 U.S. 612, 617 (1954). In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged. * * *"

See also *United States* v. *Vuitch,* No. 84, this Term, decided April 21, 1971.

[34] It has been suggested (Note, *The Bribed Congressman's Immunity from Prosecution,* 75 Yale L. J. 335, 347–348) that the bribery statue permits punishment "upon evidence of intent only" since it does not literally require that the bribe have actually passed or the service have been actually performed; thus, it is said, the statute is susceptible of prosecutorial abuse for the executive's political ends. But the Note concedes that no such prosecutions had been found, and we are aware of none; the instant indictment alleges that both the bribe and the services were carried out.

We urge, in sum, that Congress has the power to prohibit such bribery of its members, that it may specifically exercise that power under its plenary authority to legislate, and that it has done so in this statute which narrowly defines the crime for which members may be prosecuted by the executive and punished by the courts.[35]

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[35] No more restrictive test of effective legislation makes any realistic sense. If an unscrupulous prosecutor were out "to get" a particular member of Congress, he might be able to secure groundless charges of tax evasion or other crimes unrelated to official duties. But such a possibility has never warranted the adoption of a rule of absolute congressional immunity from such charges. See, *e.g.*, *Burton v. United States*, *supra*; *May v. United States*, 175 F. 2d 994 (C.A.D.C.), certiorari denied, 338 U.S. 830. By the same token, the remote possibility that prosecutorial discretion might be abused where improper legislative conduct is involved should not be held to outweigh the public interest in prosecuting a Congressman who accepts a bribe in exchange for a legislative act where Congress in its legislative judgment has made that act a crime.

CONCLUSION

Both on constitutional and statutory grounds the court below erred in dismissing the indictment against appellee. For the reasons stated, the judgment of the district court should be reversed and the cause remanded with directions to reinstate the dismissed counts.

Respectfully submitted.

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MAY 1971.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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Table of Contents

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional and Statutory Provisions Involved	3
Statement	3
Summary of Argument	5
Argument	8
I. The jurisdiction of this Court is open to serious question	8
A. The decision below was a summary judgment on the merits, precluding appeal	9
B. The decision below was not based upon the invalidity of the federal bribery statute	15
C. The decision below was not one sustaining a motion in bar	17
II. The District Court properly sustained the appellee's claim of legislative immunity under the Speech or Debate Clause	20
A. The holding in *Johnson* supports the decision below	20
B. The Speech or Debate Clause bars judicial inquiry into motivations of a Senator's vote or decision	33
C. Congress cannot enact a statute depriving members of their constitutional immunity	49
D. The federal bribery statute, 18 U.S.C. §201, is not a narrowly drawn statute	72
Conclusion	84

TABLE OF CITATIONS

Cases

	PAGE
American Insurance Company v. Canter, 1 Pet. 511 (1828)	65
Anderson v. Dunn, 6 Wheat. 204 (1821)	52, 53, 59
Aptheker v. Secretary of State, 378 U.S. 500 (1964)	62
Ashton v. Kentucky, 384 U.S. 195 (1966)	73
Barr v. Matteo, 360 U.S. 564 (1959)	48
Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929)	55, 56-57, 63
Barsky v. United States, 167 F. 2d 241 (D.C. Cir.), cert. denied 334 U.S. 843 (1948)	48, 68
Best v. District of Columbia, 291 U.S. 411 (1934)	12
Bond v. Floyd, 385 U.S. 116 (1966)	62
Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53 (1884)	59-60
Burton v. United States, 202 U.S. 344 (1906)	50-51
Cantwell v. Connecticut, 310 U.S. 296 (1940)	73
Carroll v. United States, 354 U.S. 394 (1957)	16, 17
Chandler v. Judicial Council of Tenth Circuit, 398 U.S. 74 (1970)	64
In re Chapman, 166 U.S. 661 (1897)	52, 54, 56, 82
Cochran v. Couzens, 42 F. 2d 733 (D.C. Cir.), cert. denied 282 U.S. 874 (1930)	48, 68
Coffin v. Coffin, 4 Mass. 1 (1808)	41-42, 43, 59-60
Cohens v. Virginia, 6 Wheat. 264 (1821)	38
Crowell v. Benson, 285 U.S. 22 (1932)	76
Dombrowski v. Burbank, 358 F. 2d 821 (D.C. Cir. 1966)	13
Dombrowski v. Eastland, 387 U.S. 82 (1967)	15, 18, 25, 28, 39, 44, 48
Elfbrandt v. Russell, 384 U.S. 11 (1966)	73
Fairbank v. United States, 181 U.S. 283 (1901)	59-60
Fong Foo v. United States, 369 U.S. 141 (1962)	12

	PAGE
Ex parte Frankfeld, 32 F. Supp. 915 (D.D.C. 1940)	82
Fulks v. United States, 283 F. 2d 259 (9th Cir.), cert. denied 365 U.S. 812 (1961)	75
Harlow v. United States, 301 F. 2d 361 (5th Cir.), cert. denied 371 U.S. 814 (1962)	75
Haynes v. United States, 390 U.S. 85 (1968)	62
Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970)	48, 62
International Association of Machinists v. Street, 367 U.S. 740 (1961)	76
Jones v. Montague, 194 U.S. 147 (1904)	55
Kemmler v. United States, 133 F. 2d 235 (1st Cir. 1942)	75
Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)	25
Keogh v. Horner, 8 F. Supp. 933 (S.D. Ill. 1934)	55
Kilbourn v. Thompson, 103 U.S. 168 (1881)	22, 24, 39-44, 46, 48, 51-54, 56, 59, 64, 65
Kinoy v. District of Columbia, 400 F. 2d 761 (D.C. Cir 1968)	83
Laxalt v. Cannon, 80 Nev. 588, 397 P. 2d 466 (1964)	55
Lusk v. Hanrahan, 244 F. Supp. 539 (E.D. Ill. 1965)	48
Marbury v. Madison, 1 Cranch 137 (1803)	45, 60-61
Marshall v. Gordon, 243 U.S. 521 (1917)	52
McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960)	15, 47, 48
McGrain v. Dougherty, 273 U.S. 135 (1927)	52
McGuire v. United States, 152 F. 2d 577 (8th Cir. 1945)	13
Muskrat v. United States, 219 U.S. 346 (1910)	65
N.A.A.C.P. v. Button, 371 U.S. 415 (1963)	73-74
New York Times Co. v. Sullivan, 376 U.S. 254 (1964)	32
Odegard v. Olson, 264 Minn. 439, 119 N.W. 2d 717 (1963)	55
Parks v. United States, 355 F. 2d 167 (5th Cir. 1965)	75, 79
Powell v. McCormack, 395 U.S. 486 (1969)	*passim*
Powell v. McCormack, 395 F. 2d 577 (D.C. Cir. 1968)	45

PAGE

Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1967) 21
Reed v. County Commissioners of Delaware County, Pennsylvania, 277 U.S. 367 (1928) 51-52
Regina v. Bunting, 7 Ont. Rep. 524 (1885) 36, 70-71
Regina v. White, 13 N.S.W. Sup. Ct. 322 (1875) 36
Rex v. Boston, 33 Commw. L.R. 386 (1923) 36
Rogers v. Barnes, 474 P. 2d 610 (Colo. 1970) 55
Sanks v. Georgia, 401 U.S. 144 (1971) 27
Schick v. United States, 195 U.S. 65 (1904) 37
Sevilla v. Elizalde, 112 F. 2d 29 (D.C. Cir. 1940) 55
Shellburne, Inc. v. New Castle County, 293 F. Supp. 237 (D. Del. 1968) 44, 48
Sorrells v. United States, 287 U.S. 435 (1932) 20
Stamler v. Willis, 287 F. Supp. 734 (N.D. Ill. 1968) 64
Tenney v. Brandhove, 341 U.S. 367 (1951) 18, 22, 34, 39-47, 49, 53, 59, 61, 62, 66, 68, 80
Thorpe v. Housing Authority of City of Durham, 393 U.S. 268 (1969) 26
United States v. Apex Distributing Co., 270 F. 2d 747 (9th Cir. 1959) 9
United States v. Ballin, 144 U.S. 1 (1892) 56, 63
United States v. Birdsall, 233 U.S. 223 (1914) 79
United States v. Blue, 384 U.S. 251 (1966) 4, 13
United States v. Borden Co., 308 U.S. 188 (1939) 9, 11, 17, 26
United States v. Brewster, 401 U.S. 935 (1971) 2, 8
United States v. Brown, 381 U.S. 437 (1965) 65, 67
United States v. Carter, 231 U.S. 492 (1913) 17
United States v. Costello, 198 F. 2d 200 (2d Cir.), cert. denied 344 U.S. 874 (1952) 82
United States v. Dietrich, 126 Fed. 676 (C.C.D. Neb. 1904) 12
United States v. Evans, 213 U.S. 297 (1909) 65
United States v. Findley, 439 F. 2d 970 (1st Cir. 1971) 5, 9, 13-14

PAGE

United States v. Glazer, 129 F. Supp. 285 (D. Del. 1955) 79

United States v. Hark, 320 U.S. 531 (1944) 18

United States v. Hastings, 296 U.S. 188 (1935) 11, 17

United States v. Hoffman, 335 U.S. 77 (1948) 18

United States v. Jin Fuey Moy, 241 U.S. 394 (1916) 76

United States v. Johnson, 383 U.S. 169 (1966) *passim*

United States v. Johnson, 337 F. 2d 180 (4th Cir. 1964) 29-30, 68

United States v. Johnson, 215 F. Supp. 300 (D. Md. 1963) 28

United States v. Johnson, 419 F. 2d 56 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970) 10

United States v. Jorn, 400 U.S. 470 (1971) 8, 12, 16

United States v. Keitel, 211 U.S. 370 (1908) 26

United States v. Kissel, 218 U.S. 601 (1910) 26

United States v. Knox, 396 U.S. 77 (1969) 15-16

United States v. Maryland Co-op. Milk Producers, Inc., 145 F. Supp. 151 (D.D.C. 1956) 13

United States v. Mason, 213 U.S. 115 (1909) 26

United States v. Mersky, 361 U.S. 431 (1960) 18

United States v. Mescall, 215 U.S. 26 (1909) 26

United States v. Monia, 317 U.S. 424 (1943) 18

United States v. Murdock, 284 U.S. 141 (1931) 14, 20

United States v. Petrillo, 332 U.S. 1 (1947) 17, 26-27

United States v. Raff, 161 F. Supp. 276 (M.D. Pa. 1958) 79

United States v. Robel, 389 U.S. 258 (1967) 73

United States v. Rumely, 345 U.S. 41 (1953) 82

United States v. Shirey, 359 U.S. 255 (1959) 21

United States v. Sisson, 399 U.S. 267 (1970) 5, 8-9, 11-16, 18-20

United States v. Storrs, 272 U.S. 652 (1926) 14

United States v. Vuitch, 91 S. Ct. 1294 (1971) 4, 26

United States v. Wayne Pump Co., 317 U.S. 200 (1942) 11

	PAGE
United States v. Weller, 401 U.S. 254 (1971)	6, 14, 17-20
Ex parte Wason, L.R. 4 Q.B. 573 (1869)	31
Watkins v. United States, 354 U.S. 178 (1957)	42, 59
Wettengel v. Zimmerman, 249 Wis. 237, 24 N.W. 2d 504 (1946)	55
Whitehill v. Elkins, 389 U.S. 54 (1967)	73
Will v. United States, 389 U.S. 90 (1967)	16
Williams v. Rhodes, 393 U.S. 23 (1968)	61
Williams v. United States, 289 U.S. 553 (1933)	65
Wilson v. United States, 369 F. 2d 198 (D.C. Cir. 1966)	82-83
Wilson v. United States, 230 F. 2d 521 (4th Cir.), cert. denied 351 U.S. 931 (1956)	79-80

Constitutions, Statutes, and Rules

United States Constitution:	
Article I, Section 1	35, 51, 62
Article I, Section 2, cl. 5	64
Article I, Section 3, cl. 6	64, 66
Article I, Section 5, cl. 1	35, 51, 55
Article I, Section 5, cl. 2	33-35, 37-38, 51-58, 62, 64
Article I, Section 6, cl. 1 (Speech or Debate Clause)	*passim*
Article I, Section 8	35, 62
Article III	47, 60, 64
First Amendment	73-74
2 U.S.C. §192	81
§194	81-83
18 U.S.C. §201 (federal bribery statute)	2-8, 15-16, 21, 24, 28-32, 72-83
§203	78
§371	24, 28-32
§3731 (Criminal Appeals Act)	2, 5-6, 8-21, 26, 27
50 U.S.C. App. §462	13

	PAGE
Act of January 24, 1857, c.19, §1, 11 Stat. 155	81
Act of February 26, 1853, c.81, 10 Stat. 170, 171	37
Act of April 30, 1790, §21, 1 Stat. 112, 117	37
Rule 2, Federal Rules of Criminal Procedure	13
Rule 12, Federal Rules of Criminal Procedure	9-10
Articles of Confederation, Art. V	45, 46
Maryland Declaration of Rights of 1776 (Art. VIII)	46
Massachusetts Bill of Rights of 1780 (Art. XXI)	46
Constitution of New Hampshire of 1784 (Art. XXX)	46

Miscellaneous

Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* (1960)	69
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4 *Blackstone's Commentaries* (5th ed. 1773)	37
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Coke, *3rd Inst.* (1797)	37
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No. 51	35
No. 62	35
No. 63	35
No. 65	66
No. 66	66
No. 81	66

PAGE

II *Hinds' Precedents of the House of Representatives* (1907) 54

House Rep. 748, Comm. on the Judiciary, 87th Cong., 1st Sess. (1961) 80

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Note, 78 HARV. L. REV. 1473 (1965) 28, 29, 36, 68, 69

Note, *The Bribed Congressman's Immunity From Prosecution*, 75 YALE L. J. 335 (1965) 29, 77-78

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II *Works of James Wilson* (Andrews ed. 1896) 40

Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960 (1951) 48

IN THE

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No. 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

OPINION BELOW

The District Court did not deliver a written opinion. Its oral opinion is contained in the Appendix at 33.

JURISDICTION

The judgment of the District Court was entered on November 3, 1970 (A. 34). A notice of appeal to this Court was filed on November 4, 1970 (A. 34-35). On March 1, 1971, this Court postponed further consideration of the

question of jurisdiction to the hearing on the merits (A. 35). *United States v. Brewster*, 401 U.S. 935 (1971). For reasons set forth in part I of the Argument, *infra*, serious questions exist as to jurisdiction under the Criminal Appeals Act, 18 U.S.C. §3731.

QUESTIONS PRESENTED

The District Court held, under the agreed facts of this case, that the Speech or Debate Clause of the Constitution, Article I, §6,[1] as interpreted by this Court in *United States v. Johnson*, 383 U.S. 169 (1966), provides a United States Senator with a constitutional shield against prosecution for alleged bribery in the performance of legislative acts (A. 33). On this direct appeal only two questions are properly before this Court:

1. Whether the Criminal Appeals Act, 18 U.S.C. §3731 (as applicable prior to its recent amendment), confers jurisdiction upon this Court not only to review a decision sustaining an affirmative defense on the merits but also to pass upon the constitutional validity of the federal bribery statute, 18 U.S.C. §201, as to which the District Court expressed no opinion.

2. Whether the District Court properly sustained the appellee's claim of legislative immunity under the Speech or Debate Clause from any prosecution arising out of his performance of legislative acts in the United States Senate.

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[1] The complete text of Article I, §6, is as follows: "The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House, they shall not be questioned in any other Place.*" (Italics added).

The Government's Brief, which mistakenly characterizes the decision below as one invalidating the underlying statute on which the indictment was based, suggests a different question:

> Whether (a) the Speech or Debate Clause or any other constitutional provision prohibits Congress from enacting a statute providing for the judicial trial and punishment of members who accept bribes in exchange for the performance of legislative acts and (b) if no constitutional prohibition exists, whether the statute here in issue constitutes a valid exercise of Congressional power (Govt. Br. 2).

We contend that legislative immunity, where applicable, is absolute and yields to no statute, however drawn or conceived. Accordingly, this Court should reaffirm the appellee's claim of immunity without pursuing the additional matters outlined in the Government's submission.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Government's Brief (2-4) sets forth the constitutional and statutory provisions here involved.

STATEMENT

On October 9, 1970, the United States District Court for the District of Columbia dismissed certain counts of an indictment charging appellee, while a United States Senator, with soliciting and accepting bribes from Cyrus T. Anderson, a lobbying representative of Spiegel, Inc., a large mail order company, in violation of the federal bribery statute, 18 U.S.C. §201 (A. 1-7). The essence of the charges was that appellee accepted payments in return for being influenced in the performance of official acts while a United States Senator and as a member of the Senate Committee on the Post Office and Civil Service with regard to his action, vote and decision on postage rate legislation.

In his motion to dismiss the indictment (A. 8), appellee invoked his claim of legislative immunity under the Speech or Debate Clause.[2] In the District Court it was demonstrated that the bribery charges were allegedly rooted in the appellee's deliberations with respect to postal legislation as well as his votes in committee and in the Senate. The Government disclaimed having any proof not directly related to such legislative acts (A. 26). In colloquy with counsel, the Honorable George Hart, District Judge, expressed the view that "the Speech and Debate Clause definitely intends to protect Senators and Congressmen from being questioned as to why as a Senator or a Congressman they voted in a certain way, made a certain speech in the Congress or voted a certain way in committee * * *" (A. 26). Judge Hart further observed:

> * * * [T]his Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought just to be putting words in. This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together (A. 30).

Contrary to the Government's position on this appeal, the District Court did not base its decision upon any construction or invalidity of the federal bribery statute. It did not reach such issues because, under the admitted cir-

[2] Another branch of his motion (A. 9) asserted that the indictment improperly charged him with aiding and abetting himself; that the charges were unconstitutionally vague; that the underlying statutory provisions, 18 U.S.C. §201(c)(1) and §201(g), were unconstitutionally vague and contained no ascertainable standard. Since these questions were not passed upon by the District Court, they are not open to review on this direct criminal appeal. *United States v. Vuitch*, 91 S. Ct. 1294, 1300 (1971); *United States v. Blue*, 384 U.S. 251, 256 (1966).

cumstances of this case and in line with *United States v. Johnson*, 383 U.S. 169 (1966), the Speech or Debate Clause was held to provide the appellee with a complete defense:

> Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the intepretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.
>
> I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, as they apply to Senator Brewster. * * * (A. 33).

The order of dismissal (A. 34) entered on November 3, 1970 was based exclusively upon the foregoing reasons, and not on the invalidity or construction of 18 U.S.C. §201.

SUMMARY OF ARGUMENT

1. The Government has not demonstrated, and cannot demonstrate, a valid jurisdictional basis under the Criminal Appeals Act (as it existed prior to its 1970 amendment).

By appropriate motion the appellee raised the affirmative objection of the Speech or Debate Clause to judicial inquiry into his legislative acts, and the District Court's ruling was in effect a summary judgment on the merits, not within the reach of Section 3731. See *United States v. Sisson*, 399 U.S. 267 (1970); *United States v. Johnson*, 383 U.S. 169 (1966); *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971).

Our conclusion is strengthened by the fact that the District Court did not review, discuss or base its decision on any finding of invalidity of the statute in question but predicated its action on the theory that the Speech or Debate Clause, as construed in *Johnson* and as properly applied to this case, should relieve the appellee of the duty of defending himself. Under these circumstances there is no basis for a contention that the jurisdiction of this Court may be founded on the second paragraph of Section 3731.

Further, *United States v. Weller*, 401 U.S. 254 (1971), and additional precedents interpreting the "motion in bar" provision of Section 3731 make it clear that the effect of an assertion of the Speech or Debate Clause by a legislator is not the functional equivalent of a special plea of confession and avoidance — the historic test of a "motion in bar". A claim of legislative immunity in no way constitutes an admission of criminal conduct and an avoidance of the consequences, but instead is an assertion of a fundamental concept necessary to the proper functioning of our form of government. The Appellee could not be called upon to confess or deny where his legislative acts or motives are called into question in any place other than the House of which he was a member. His action in inviting the attention of the Court to the application of a Constitutional principle cannot be equated to a confession of any wrongdoing on his part, since the very inquiry necessary to an ascertainment of guilt or innocence is expressly forbidden to the court in which the proceeding was held.

2. The basic law applicable to the District Court's order is clear and incontestable under the prior decisions of this Court. The Speech or Debate Clause bars a prosecution under a general criminal statute where the legislative conduct of a member of Congress is called into question. *United*

States v. Johnson, 383 U.S. 169 (1966). This doctrine, where applicable, relieves a legislator of the burden of defending himself. *Powell v. McCormack*, 395 U.S. 486 (1969.) This case is precisely within these decisions.

Constitutional history and precedents in this Court support the fundamental importance of a reading of the Speech or Debate Clause calculated to protect the legislator against being called to account for his legislative acts or motives in any forum except the House of which he is a member. Indeed, so fundamental to the proper functioning of our Government is the Clause that, we submit, separate grants of power made in the Constitution to the House and Senate cannot be delegated either by the act of one House or by concurrent acts of the Houses as respects matters covered by that Clause. The Clause cannot be divested by any *statute*, broad or narrow, of its Constitutional function of protecting the people's elected representatives.

Although a Constitutional provision deliberately adopted to perform a vital function in the proper operation of the structure of government needs no further defense, we outline the practical considerations which support the reading which the District Court gave to the Clause and believe that the view we take is supported by the most vital considerations underlying the preservation of our system of government.

Finally, we demonstrate that the federal bribery statute 18 U.S.C. 201 is in no sense a "narrowly drawn" statute either in fact or in law, but is so sweeping as to cause it to suffer from Constitutionally impermissible overbreadth. The insubstantial nature of the Government's position is clearly demonstrated by the attempt to bring within the ambit of the "narrowly drawn" concept a charge based on a general criminal statute, lacking specificity, as a vehicle

to overturn the important concept of Constitutional protection of legislator against inquiry into their legislative acts and motives.

ARGUMENT

I.

THE JURISDICTION OF THIS COURT IS OPEN TO SERIOUS QUESTION.

In an effort to restore the inquisitorial prerogatives of the Tudors and the Stuarts, and to read the Speech or Debate Clause out of the Constitution, the Government pays scant heed to the preliminary questions of jurisdiction which were postponed to the hearing of this case on the merits. *United States v. Brewster*, 401 U.S. 935 (1971). The serious questions which we previously raised in our Motion to Dismiss or Affirm (4-13), filed in December, 1970, are not answered by unpersuasive bland assurances in the Government's Brief. We are not reluctant to address the merits. The appellee desires a conclusive adjudication of his claim under the Speech or Debate Clause, confident that this Court will fully preserve the historic sanctity of deliberations and votes in the Congress and maintain that delicate balance of governmental powers which the Constitution secures. However, the orderly administration of justice calls for examination of the jurisdictional problems and it seems clear that the Government's far-reaching submission exceeds its jurisdictional grasp under the Criminal Appeals Act.[3]

It is incumbent upon the Government to demonstrate that its appeal falls into one of the categories set forth in

[3] The 1970 liberalizing amendment to the Act, 84 Stat. 1890, has no application to this appeal (Govt. Br. 7 n.4). See *United States v. Jorn*, 400 U.S. 470, 477 n.6 (1971). As to the version of the Act applicable to this appeal, our problem is aptly summed up in the comments of Justice Harlan in *United States v. Sisson*, 399 U.S. 267 (1970): "Clarity is to be desired in any statute, but in matters of

the Act, for "the exceptional right of appeal given to the Government by the Criminal Appeals Act is strictly limited to the instances specified." *United States v. Borden Co.*, 308 U.S. 188, 192 (1939). *See United States v. Sisson*, 399 U.S. 267, 291 (1970). Here, the Government attempts to invoke two provisions which authorize direct appeal to this Court:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * *. 18 U.S.C. 3731.

A. THE DECISION BELOW WAS A SUMMARY JUDGMENT ON THE MERITS, PRECLUDING APPEAL.

Before considering the Government's argument that the decision below was "based upon the invalidity * * * of the statute upon which the indictment * * * is founded" (Govt. Br. 7), it must first be determined whether that decision was one "setting aside or dismissing" the indictment. That paragraph of §3731 was meant to apply only to dismissals based upon defects in the indictment or information, or in the institution of the prosecution.[4] No Government appeal lies from a pre-trial adjudication of an affirmative defense raised by motion, except under the narrow category reserved for motions in bar.

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jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *Id.* 308.

[4] *United States v. Findley*, 439 F. 2d 970, 972 (1st Cir. 1971); *United States v. Apex Distributing Co.*, 270 F. 2d 747, 755 (9th Cir. 1959). See Rule 12(b)(2), Federal Rules of Criminal Procedure. Other defenses or objections which are capable of determination with-

We pointed out in our Motion to Dismiss or Affirm that the Speech or Debate Clause is not an automatic, self-executing prohibition against the indictment of Congressmen. It does not shield conduct "that is in no wise related to the due functioning of the legislative process." *United States v. Johnson*, 383 U.S. 169, 172 (1966). Conversely, a prosecution may not attempt to "draw into question the legislative acts of the defendant member of Congress or his motives in performing them." *Id.* 185. Between these extremes lie abundant shades of gray. Whether the prosecuted activity is merely "an incidental part of the Government's case," *id.* 176, or lies at its very roots are ordinarily questions of fact determinable with the general issue, either before or during trial. As *Johnson* holds, a prosecution of a Congressman may run its normal course once it has been "wholly purged of elements offensive to the Speech or Debate Clause." *Id.* 185.[5]

When a defense is raised under the Clause by pre-trial motion, as is permissible under Rule 12(b)(1), Federal Rules of Criminal Procedure, the trial court must determine the applicability of the Clause, in advance of trial, if possible, to insure that "legislators are relieved of the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 505 and n.25 (1969). In this case, the required determination was facilitated and any ambiguity in the indictment was eliminated by the pre-trial disclosures of the Government. In its representations to the Court in memoranda and oral argument, the Government acknowl-

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out the trial of the general issue may also be raised by motion and determined before trial. Rule 12(b)(1), (4).

[5] The case was remanded for a new trial. *United States v. Johnson*, 383 U.S. 169, 186 (1966). On remand, the speech-oriented conspiracy count was dismissed without Government opposition but Johnson was reconvicted "on the remaining substantive counts which had nothing to do with his speech". *United States v. Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970).

edged that all activities covered in the indictment related to the appellee's performance of legislative duties in the Senate. In disposing of the motion, the District Judge acted upon these stipulations and prefaced his decision as follows:

> Gentlemen, *based on the facts of this case, it is admitted* by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States (A. 33). (italics added).

As was noted in *United States v. Sisson*, "this Court has never held that an appeal lies from a decision which depends not upon the sufficiency of the indictment alone, but also on a stipulation of the parties." 399 U.S. at 285. *Sisson* suggests that the introduction of a defense on the merits supported by facts, and sustained by the trial court as part of the general issue, removes the case from the appealable category. *Id.* 286, 291, 301. Such a disposition is not bottomed on the indictment alone, as it *must* be in order to qualify for treatment under the provision of §3731 here relied upon by the Government. See, e.g., *United States v. Wayne Pump Co.*, 317 U.S. 200, 208 (1942); *United States v. Borden Co.*, 308 U.S. 188, 193 (1939); *United States v. Hastings*, 296 U.S. 188, 194 (1935). As this Court observed in dismissing the appeal in *Sisson*:

> The decision below rests on affirmative defenses, which the Court thought, Sisson could claim because of his beliefs. It has never been thought that an indictment, in order to be sufficient, need anticipate affirmative defenses. * * * In short, this indictment cannot be taken as insufficient for on the one hand, it recites the necessary elements of an offense and on the other hand, it does not allege facts which themselves demonstrate the availability of a constitutional privilege. *Id.* 399 U.S. at 288-289.

Here the District Court sustained the appellee's claim of legislative immunity not solely upon the averments of the indictment but also upon the Government's factual disclosures. Unlike *Sisson* and *United States v. Jorn*, 400 U.S. 470, 473-476 (1971), the appellee was not placed in jeopardy in a constitutional sense. There can be no question, however, that under the District Court's view of the law, had the case proceeded to trial the same facts would have compelled an acquittal from which no Government appeal would lie. See, e.g., *Fong Foo v. United States*, 369 U.S. 141, 142 (1962).

By its action the District Court held, in effect, that this case could not proceed "wholly purged of elements offensive to the Speech or Debate Clause." *United States v. Johnson*, 383 U.S. 169, 185 (1966). If such action upon admitted facts is non-appealable, the result follows no matter when that action is taken. As Judge (later Justice) Van Devanter once said, "it would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end." *United States v. Dietrich*, 126 Fed. 676, 678 (C.C.D. Neb. 1904). With these words, a bribery prosecution of a Senator was dismissed when the Government revealed that he received the payments before taking his seat in the Senate. Surely "there is little functional justification for reviewing a trial court's action in entering judgment as soon as it becomes apparent that the case must fail, since a judgment of acquittal at the close of the evidence would admittedly not be reviewable, even where the trial court offered no reason for its action."[6]

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[6] Note, *Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 YALE L.J. 171, 173 (1961). "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon facts produced." *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). Dismissals frequently occur where the Government's own

Viewed in this perspective, the action of the District Court constitutes a summary judgment on the merits,[7] singling out and adjudicating an affirmative defense in advance of trial and thereby eliminating unjustifiable expense and delay while achieving a just determination. See Rule 2, Federal Rules of Criminal Procedure. Our conclusions are fortified by *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971), decided after this Court postponed jurisdiction in the present case. In *Findley*, the defendant was indicted under 50 U.S.C. App. §462 for refusal to report for induction as ordered. His pre-trial motion to dismiss was granted on the ground that the order was invalid because his draft board had given no reason for refusing to reopen his classification. Dismissing the Government's appeal, the First Circuit held "that although labelled a motion to dismiss, under the rationale of *Sisson* the [trial] court's action was in reality an acquittal, or, more precisely, a summary judgment on the merits not appealable anywhere under Section 3731." *Id.* 972. Chief Judge Aldrich concluded his review of precedents with the observation "that if a dismissal is a result of the showing of evidentiary facts dehors the indictment which, if established at a trial, would constitute a defense on the merits, the court's ruling, however described, is in effect an acquittal, and thus not within the intended purpose of the appeals statute." *Ibid.* The soundness of this rule is borne

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evidence at trial indicates the existence of an iron-clad defense. See, e.g., *McGuire v. United States*, 152 F. 2d 577, 580 (8th Cir. 1945); *United States v. Maryland Co-op. Milk Producers, Inc.*, 145 F. Supp. 151, 152 (D.D.C. 1956).

[7] In a civil context, summary judgment was properly granted to a Senator where, as here, the "record before the District Court contained unchallenged facts of a nature and scope sufficient to give [him] an immunity against answerability in damages for actions taken in the course of [his] legislative activities." *Dombrowski v. Burbank*, 358 F. 2d 821, 824 (D.C. Cir. 1966), aff'd *sub. nom. Dombrowski v. Eastland*, 389 U.S. 82 (1967).

out by negative impact upon the administration of justice which a contrary approach might occasion:

> If an appeal will lie in the present case, which it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal. We will not adopt such a penalizing construction of the statute. *Id*, 974.

2. What has been said of the "dismissing any indictment" provision also disposes of the Government's contention that the case is appealable under the "motion in bar" branch of the Criminal Appeals Act. The latter provision was recently construed restrictively in *United States v. Weller*, 401 U.S. 254 (1971), in line with the common law antecedents of a special plea in bar. *Id.* 259. As Justice Holmes once remarked, the Criminal Appeals Act "uses technical words, 'special plea in bar' and we see no reason for not taking them in their technical sense." *United States v. Storrs*, 272 U.S. 652, 654 (1926). "Even under the most expansive view, however, a motion in bar cannot be granted on the basis of facts which would necessarily be tried with the general issue in the case." *United States v. Sisson*, 399 U.S. 267, 301 (1970). See *United States v. Weller*, 401 U.S. 254, 259-260 (1971). Except for matters in confession and avoidance, "there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *United States v. Murdock*, 284 U.S. 141, 151 (1931). Motion in bar jurisdiction thus does not turn upon the extent to which the facts are undisputed or resolved by stipulation, cf., *United States v. Sisson*, *supra* at 284-286, "for this would mean the parties

and the lower court simply could foist jurisdiction upon this Court." *Id.* 287.

B. THE DECISION BELOW WAS NOT BASED UPON THE INVALIDITY OF THE FEDERAL BRIBERY STATUTE.

We turn now to the Government's main contention that the decision below was "based upon the invalidity * * * of the statute upon which the indictment * * * is founded" (Govt. Br. 7). The District Court expressed no opinion as to the validity of the federal bribery statute, 18 U.S.C. §201, but spoke instead of "immunity under the Speech and Debate Clause" in terms of a shield "from any prosecution for alleged bribery to perform a legislative act" (A. 33). A "shield" implies an affirmative defense,[8] as does "immunity." These terms readily correspond to declarations that the Speech or Debate Clause is the source of "legislative immunity" providing Congressmen with "a defense on the merits" and relieving them "of the burden of defending themselves." *Powell v. McCormack*, 395 U.S. 486, 502, 503, 505 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). Judge Hart's "constitutional shield" approach to the case, we submit, clearly negates the proposition that he "based" his decision upon the invalidity of the underlying statute. Rather, the District Judge rightly perceived a defense so strong as to eliminate the need to probe for weakness in the statutory underpinnings of the indictment.

The only precedent which the Government can muster for its "invalidity" theory of jurisdiction consists of a footnote passage in *United States v. Knox*, 396 U.S. 77, 79 n. 2 (1969). As the Government reads *Knox*, a judgment sustaining the appellee's claim of legislative immunity must

[8] Judge Hart's terminology echoes a statement by his colleague, Judge Youngdahl, who described the Speech or Debate Clause "as a shield against executive interference with the individual legislator * * *." *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960).

be treated as a decision that the federal bribery statute cannot be constitutionally applied to any member of Congress who accepts a bribe in exchange for legislative conduct (Govt. Br. 8-9).

This theory is unconvincing on several grounds: *First*, it assumes that the federal bribery statute (as distinguished from the indictment) reaches legislative conduct—a matter which the District Court did not necessarily decide. *Second*, jurisdiction was apparently unquestioned in *Knox*. Probable jurisdiction was noted, not postponed as in the present appeal. *Third*, the "invalidity" branch of the Criminal Appeals Act was invoked by this Court, apparently *sua sponte*, in order to reserve the "motion in bar" provision for "full dress consideration" later the same term in *United States v. Sisson*, 399 U.S. 267 (1967). Neither party to the appeal suggested it. *Fourth*, Judge Hart's opinion was "based on the facts of this case," as admitted by the Government (A. 33). This was manifestly not so in *Knox*, 396 U.S. at 79 n.2. *Fifth*, the authorities marshalled in support of the Knox footnote all dealt with civil appeals, making *Knox* somewhat difficult to square with later admonitions "that the Criminal Appeals Act should be construed strictly against the Government's right of appeal," *United States v. Sisson*, *supra* 399 U.S. at 286, and that appeals by the Government in criminal cases "are something unusual, exceptional, not favored." *Id.* 291. See also *Will v. United States*, 389 U.S. 90, 96-97 (1967); *Carroll v. United States*, 354 U.S. 394, 399-400 (1957). Civil appeals are not governed by considerations "supporting the canon of strict construction traditionally applied to this statute." *United States v. Jorn*, 400 U.S. 470, 476 (1971). *Finally*, the argument which the Government derives from *Knox* — that the federal bribery statute was "invalidated" as applied to appellee — is little more than a veiled admission that the District Court sustained a defense on the merits.

To assume or infer that the decision of the District Court was "based" upon the invalidity of the underlying statute is not enough. There must be "an expression of opinion in some form as to manifest clearly whether its act proceeded upon a construction of the statute" before this Court may assume jurisdiction. *United States v. Carter*, 231 U.S. 492, 494-495 (1913).[9] A direct appeal will not lie where the District Court has considered the invalidity or construction of the statute but has rested its decision on some other ground. *United States v. Borden Co.*, 308 U.S. 188, 193 (1939). Jurisdiction is limited to those cases where the dismissal is "based" *solely* upon the invalidity or construction of the underlying statute. *United States v. Hastings*, 296 U.S. 188, 194 (1935). To so characterize the decision below "requires a straining that is not permissible in the light of the principles and history concerning criminal appeals" under the Criminal Appeals Act. *Carroll v. United States*, 354 U.S. 394, 405 (1957).

C. THE DECISION BELOW WAS NOT ONE SUSTAINING A MOTION IN BAR.

Until the recent holding in *United States v. Weller*, 401 U.S. 254 (1971), there was arguable support for the Government's position that this appeal falls within the "motion in bar" provision of the Criminal Appeals Act. A claim of legislative immunity does bear a superficial resemblance to a "motion in bar." *Weller* itself places a "claimed immunity because of prior self-incriminatory testimony or a

[9] Justice Frankfurter once wrote: "Other questions may be imbedded in the case which may eventually come to the surface. But they are not to be brought to the surface here under the limited, specific review given by the Criminal Appeals Act. It is to such implicit questions of pleading and to statutory or constitutional questions not passed upon by a district court, that Mr. Justice Hughes had reference when he said, 'The Government's appeal does not open the whole case.'" *United States v. Petrillo*, 332 U.S. 1, 15 (1947) (concurring opinion).

statutory grant of immunity," in the "motion in bar" category. 401 U.S. at 260.[10] The Speech or Debate Clause, if pleaded, "not only provides a defense on the merits but also protects a legislator from the burden of defending himself." *Powell v. McCormack*, 395 U.S. 486, 501-503 (1969). See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951). If the test of "motion in bar" jurisdiction was merely "whether the judgment is one which will end the case and exculpate the defendant," *United States v. Mersky*, 361 U.S. 431, 441-442 (1960) (Brennan, J., concurring), then the decision below might be reviewable by that standard. *United States v. Blue*, 384 U.S. 251, 254 (1966); *United States v. Hark*, 320 U.S. 531, 536 (1944). See *United States v. Sisson*, 399 U.S. 267, 326-346 (1970) (White, J., dissenting).

However, as we explained in our Motion to Dismiss or Affirm (10-11), a special plea in bar — the functional equivalent of a "motion in bar" — is restricted to (1) matters of confession and avoidance which (2) occur *after* the events charged in the indictment and (3) not admissible under the general issue. The *Weller* decision clearly reinforces our position. The Court noted that it "has never settled on a definitive interpretation of what constitutes a 'motion in bar'," and then announced the following standard:

> A characteristic common to all these [common law] definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged *and that the acts were a crime*. Rather, it claimed that

[10] In two cases cited for this proposition in the *Weller* opinion, *United States v. Hoffman*, 335 U.S. 77, 78 (1948), and *United States v. Monia*, 317 U.S. 424 (1943), neither the Court nor the parties discussed the question of jurisdiction. In each case, statutory immunity was not bound up with the issue of guilt or innocence, as here, but represented a new development intervening between the offense and the indictment.

> nevertheless he could not be prosecuted for his crime because of some extraneous factor. *A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.* *Id.* 401 U.S. at 260. (italics added).

Then the Court concluded:

> Testing the appellee's motion to dismiss by this standard, we think it plain that it cannot qualify as a 'motion in bar.' The appellee did not deny that he refused to submit to induction, *but he claimed that his conduct was not a crime* because of the prior denial of counsel. *He has not confessed to a crime and claimed immunity from prosecution; he argues that he has committed no crime.* *Id.* 261. (italics added).

Although it is perfectly true, as the Government contends, that the appellee has claimed legislative immunity from prosecution, the element of "confession" is utterly lacking. The Appellee has consistently denied that his conduct violated any law; he maintains that he is charged with no act which may constitutionally be made a crime, even if such act occurred. *Weller* did not hold that an "avoidance" alone would bring the case within the limited confines of the "motion in bar" provision.

Contrary to the Government's assertion, the defense under the Speech or Debate Clause does not introduce an "extraneous factor" of the sort depicted in *Weller*. It is not an intervening development which rescues an otherwise culpable defendant from criminal liability. The claim asserted by the appellee denies the attachment of criminal consequences to his conduct but does not introduce new matter as is invariably the case with former jeopardy, pardon, running of limitations, a subsequent grant of immunity and the other examples cited in the *Weller* opinion, 401 U.S. at 261. It is a defense "so intertwined with the general

issue that it must be tried with the general issue." *United States v. Sisson*, 399 U.S. 267, 302 (1970).

At common law, defenses contemporaneous with the offense charged were tried with the general issue and could not be raised by special plea in bar. See, e.g., *Sorrells v. United States*, 287 U.S. 435, 452 (1932) (entrapment). Indeed, it was considered improper to set up a defense admissible under the plea of not guilty. *United States v. Sisson, supra* at 301; *United States v. Murdock*, 284 U.S. 141, 150 (1931). "A special plea in bar is appropriate where defendant claims former acquittal, former conviction, and pardon but there is no warrant for its use to single out for determination in advance of trial matters of defense either on questions of law or fact." *United States v. Murdock, supra* 284 U.S. at 151 (citations omitted). See also *United States v. Weller, supra* 401 U.S. at 261 n.12; *United States v. Sisson, supra* 399 U.S. at 300 n.53.

Accordingly, the argument that this is "a classic case of confession and avoidance" (Govt. Br. 10) cannot be sustained under *Weller* or any other formulation.

II.

THE DISTRICT COURT PROPERLY SUSTAINED THE APPELLEE'S CLAIM OF LEGISLATIVE IMMUNITY UNDER THE SPEECH OR DEBATE CLAUSE.

A. THE HOLDING IN *JOHNSON* SUPPORTS THE DECISION BELOW.

1. On the merits, this case gives rise to a single question: whether the Speech or Debate Clause provides a Senator with a complete defense to a bribery prosecution necessitating inquiry into his deliberations and votes upon pending legislation. Judge Hart, himself no stranger to

the Speech or Debate Clause,[11] regarded this question as having been answered in the affirmative in *United States v. Johnson*, 383 U.S. 169 (1966). He held "that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act" (A. 33). Since the controlling principles of *Johnson* were correctly applied below, this Court's task is completed and collateral argument is wholly beside the point. Under the strictures of the Criminal Appeals Act, "this Court reviews judgments, not arguments assailing them," *United States v. Shirey*, 359 U.S. 255, 261 n. 5 (1959).

Johnson involved a conspiratorial attempt on the part of a Congressman and others to exert influence on the Department of Justice to obtain dismissal of mail fraud indictments pending against officers of a savings and loan company. As part of the general scheme to influence the Department, Congressman Johnson was charged with accepting payments in return for making a speech on the floor of the House of Representatives. The prosecution alleged that Johnson was influenced in his official capacity by receiving substantial sums in the form of "campaign contributions" and "legal fees" for his actions. *United States v. Johnson*, *supra* 383 U.S. at 172. Although the Government did not proceed under the federal bribery statute, as it does here, it did undertake to prove that the payments "were made simply to 'buy' the Congressman." *Ibid.*

At trial the bulk of the case dealt with Johnson's money transactions with co-conspirators and with dealings with

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[11] See his opinion in *Powell v. McCormack*, 266 F. Supp. 354, 355 (D.D.C. 1967), aff'd 395 F. 2d 577 (D.C. Cir. 1968), aff'd in part 395 U.S. 486 (1969).

the Department of Justice. But evidence about his speech caused the very sort of inquiry proscribed by the Speech or Debate Clause.

> The constitutional infirmity infecting this prosecution is not merely a matter of the introduction of inadmissible evidence. The attention given to the speech's substance and motivation was not an incidental part of the Government's case, which might have been avoided by omitting certain lines of questioning or excluding certain evidence. The conspiracy theory depended upon a showing that the speech was made solely or primarily to serve private interests, and that Johnson in making it was not acting in good faith, that is, that he did not prepare or deliver the speech in the way an ordinary Congressman prepares or delivers an ordinary speech. *Id.* 176-177.

Reviewing the Clause in historical perspective, and in the light of its two prior encounters with it,[12] this Court reaffirmed "that the legislative privilege will be read broadly to include not only 'words spoken in debate,' but anything 'generally done in a session of the House by one of its members in relation to the business before it'," and that "an unworthy purpose does not destroy the privilege." *Id.* 180. The immediate question was whether the Clause was broad enough to embrace "a criminal prosecution based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests." *Ibid.* The Court answered in the affirmative, finding the Clause to be unmistakably applicable:

> However, reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to *prevent it from being made the basis of a criminal charge* against a member of Congress of con-

[12] *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168 (1881).

spiracy to defraud the United States by impeding the due discharge of government functions. The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and * * * that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry. *Ibid.* (italics added).

After explaining that legislative conduct cannot be made the foundation of civil or criminal proceedings against a disfavored Congressman, however corrupt his motives, *id.* 183-184, the Court summarized its decision as follows:

> We hold that a prosecution under a general criminal statute dependent upon such inquiries [into legislative acts or motives] necessarily contravenes the Speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us. Our decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them. ***And, without intimating any view thereon, we expressly leave open for consideration when the case arises a prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members.*** *Id.* 184-185 (italics added).

2. The italicized sentence is the entire foundation of the Government's appeal. Seizing upon what was *not* decided in *Johnson*, and disregarding all else, the Government insists that its prosecution was "founded upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members". *Id.* 185. It argues that Congress possesses unfettered con-

stitutional power to enact a statute attaching criminal sanctions to a member who may accept payments in exchange for performance of legislative acts and that the federal bribery statute under which the appellee was indicted represents a "narrowly drawn" exercise of such assumed power (Govt. Br. 10-12).

Apart from the "narrowly drawn statute" argument, the Government does not undertake to distinguish this case from *Johnson*. It plainly accepts the holding in *Johnson* "that the Speech or Debate Clause bars a prosecution under a general criminal statute (in that case for conspiracy under 18 U.S.C. §371) which calls into question the *legislative conduct* of a member of Congress" (Govt. Br. 10-11) (italics added). It concedes as it must under *Johnson* and more recent decisions that "[c]ommittee reports, resolutions, and the act of voting are equally covered, as are 'things generally done in a session of the House by one of its members in relation to the business before it'." (Govt. Br. 11 n.5).[13] Nor does the Government deny that a charge of "accepting a bribe" was central to *Johnson* no less than it is here. *Ibid.* Finally, it observes that "immunity conferred by the Clause was intended to prevent legislative intimidation by, *or accountability to*, other branches of government" (Govt. Br. 20) (italics added).

In short, the Government has no quarrel with *Johnson*, either as a precedent or as applied by the District Court, except for its argument based upon the non-commital dictum in *Johnson* — *an argument which the District Court did not reach*. Having decided in reliance upon *Johnson* that the constitutional shield of the Clause protects the appellee, the District Court found it unnecessary to examine the sword of the statute to see whether it was "nar-

[13] Quoting from *Powell v. McCormack*, 395 U.S. 486, 502 (1969) and *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

rowly drawn". Thus the question left open in *Johnson* was not passed upon below and is here on direct appeal as a matter of first impression for this Court, together with a host of component issues which have never been resolved. If the question left open in *Johnson* still remains open, which should not be lightly assumed,[14] it becomes necessary to pursue the Government's inquiry through an unexplored thicket of constitutional provisions in which the most fundamental powers of the Senate are rooted. Then the legislative history, scope, and interpretation of the federal bribery statute must be ascertained and applied to an unprecedented set of facts. Finally, this Court would be obliged to decide — all without benefit of a precise decision on the point — whether this important Act of Congress as construed constitutes "a narrowly drawn statute" within the intendment of *Johnson* and, if so, whether it can be squared with the constitutional prohibition expressed in the Speech or Debate Clause.

These delicate topics need not be examined at present. *Johnson*, whatever its limitations, does extend to all prosecutions of unquestioned similarity. By leaving an open question in one case this Court is not obliged to tackle it in another merely because, like Mount Everest, it is there. This is especially true where the line of inquiry, if pushed to its conclusion, ultimately requires a decision upon the constitutional validity of an Act of Congress — "the gravest and most delicate duty that this Court is called upon to perform." *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963). In every appeal, but particularly in cases

[14] The Speech or Debate Clause has been illuminated in two subsequent opinions. *Powell v. McCormack*, 395 U.S. 486, 501-506 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967). In *Powell, supra* at 502-503, the Court indicated that the Speech or Debate Clause "not only provides a defense on the merits but also protects a legislator from the burden of defending himself."

brought up under the Criminal Appeals Act, this Court's "inquiry is limited to the particular question decided by the court below." *United States v. Mescall*, 215 U.S. 26, 31 (1909). See *United States v. Keitel*, 211 U.S. 370, 398 (1908). "The Government's appeal does not open the whole case." *United States v. Borden Co.*, 308 U.S. 188, 193 (1939).[15] Such limitations must be heeded. Open questions should be reserved for open cases.

The holding of the District Court, we submit, properly avoided a direct confrontation between an Act of Congress and the Speech or Debate Clause. By adhering closely to the precedents of this Court, which have uniformly recognized legislative immunity under the Clause without questioning the statutory basis of the underlying proceeding, Judge Hart was acting in the best traditions of judicial restraint. As this Court has said on countless occasions, it is not a judicial function "to decide abstract, hypothetical or contingent questions * * * or to decide any constitutional question in advance of the necessity for its decision." *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 284 (1969), and cases cited. As said in *United*

[15] See n.9, *supra*. See also *United States v. Vuitch*, 91 S. Ct. 1294, 1300 (1971); *United States v. Petrillo*, 332 U.S. 1, 5 (1947). The Criminal Appeals Act vests "this Court with jurisdiction only to review the particular question decided by the Court below for which the statute provides." *United States v. Keitel*, 211 U.S. 370, 398 (1908). Under motion in bar jurisdiction, a determination as to the construction of the federal bribery statute or its validity as a "narrowly drawn statute passed by Congress in the exercise of its legislative power" would seem outside the scope of this Court's review. *United States v. Kissel*, 218 U.S. 601, 604 (1910); *United States v. Mason*, 213 U.S. 115 (1909). See Stern & Gressman, *Supreme Court Practice* 43 (4th ed. 1969). If so, then this Court's jurisdiction (assuming its existence) extends only to the specific question whether the shield of the Speech or Debate Clause, as construed in *Johnson*, is also controlling here. Cf., *United States v. Mason*, *supra*.

States v. Petrillo, 332 U.S. 1, 5 (1947),[16] and repeated again last term, this Court has "consistently refrained from passing on the constitutionality of a statute until a case involving *it has reached a stage where the decision of a precise constitutional issue is a necessity.*" *Sanks v. Georgia*, 401 U.S. 144, 151 (1971). If the principles of *Johnson* are controlling, as the District Judge held, then this case does not warrant the dangerous excursion which the Government invites.

3. There is really no difference between what was expressly forbidden by *Johnson* and what was attempted here. The essence of the indictment is the allegation that the appellee, in his capacity as a United States Senator and as a member of a Senate committee considering postal rate legislation, "corruptly asked, solicited, sought, accepted, received and agreed to receive" various sums from a registered lobbyist and another "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation." See counts 1, 3, 5, 7, 9 (A. 1-7). Certainly Judge Hart's application of the Speech or Debate Clause to this indictment involved no unwarranted expansion of the principles articulated in *Johnson*. The contrary is true. If the appellee's motion to dismiss had been overruled, his legislative actions, votes, and decisions on postal legislation would have been thrown open to searching inquiry in the courtroom — and "that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169, 180 (1966). Moreover, as this Court has said on two occasions since *Johnson*, "the Clause not only provides a defense on the merits *but also protects a legislator from the burden of defending himself.*"

[16] Spoken in the context of the Criminal Appeals Act.

Powell v. McCormack, 395 U.S. 486, 502-503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967) (italics added). Forcing the appellee to stand trial, thereby making him accountable to a jury for his actions, votes, or decisions in the United States Senate on postal rate legislation, would sabotage the whole purpose of the Clause — "to insure that legislators are not distracted from or hindered in the performance of their task by being called into court to defend their actions." *Powell v. McCormack, supra* at 505.[17]

Certainly *Johnson* affords no basis for the argument that federal bribery prosecutions must be excepted from its reach. To be sure, Congressman Johnson was not charged under the federal bribery statute. He was, however, prosecuted for bribery in fact if not in terms. The indictment itself, although not based upon the federal bribery statute, charged him with accepting compensation for making a speech — a bribe, in other words.[18] The charge was calculated to support proof that bribe payments "were made

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[17] The refusal of a District Court to dismiss the "bribed speech" charges against Congressman Johnson, *United States v. Johnson*, 215 F. Supp. 300 (D. Md. 1963), came in for scholarly criticism even prior to this Court's decision. "The district court in Johnson held that the privilege does not apply when a bribe is involved because it thought that 'immunizing' legislators who 'sold themselves' would ironically subvert the purpose of the privilege, namely, the promotion of the independence of the legislature. However, the privilege was primarily intended to 'immunize' the legislative branch from interference by the executive and judicial branches. If the district court's reasoning had prevailed, the judiciary would investigate legislative motivation whenever bribery was alleged by the executive. Although the legislature would be protected from interference by individuals, its independence of the other two governmental branches would be lost." Note, 78 HARV. L. REV. 1473, 1475 (1965).

[18] To use the Government's parlance, "*Johnson* involved a Congressman's conviction for conspiring to impair lawful government functions *by accepting a bribe* to make a speech on the floor of the House of Representatives." (Govt. Br. 11 n.5) (italics added).

simply to 'buy' the Congressman."[19] No meaningful distinction exists between such conclusion in *Johnson* and the language of the federal bribery statute, speaking of receiving "anything of value * * * in return for being influenced in [the] performance of any official act".[20]

From its very inception the *Johnson* case proceeded as if it had been brought under the federal bribery statute. The trial and appellate courts differed over the Speech or Debate Clause, but both observed the plain relevance of the federal bribery statute to the prosecution of Congressman Johnson. See *United States v. Johnson*, 337 F. 2d 180, 189 (4th Cir. 1964), reversing 215 F. Supp. 300, 306 (D. Md. 1963).[21] Both rulings, as the Government itself contended in this Court, stand for the proposition "that, for the purpose of determining the applicability of Article I, Section 6, there is no material difference between a prosecution for accepting a bribe and one for conspiring to defraud the United States by accepting a bribe."[22]

Not surprisingly, then, the Government approaches this case with many of the same arguments and policy considerations unsuccessfully advanced in *Johnson*. Indeed, the Government presents virtually the same question.[23] In its petition for certiorari and brief on the merits in *Johnson*, for example, the Government complained that

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[19] *United States v. Johnson*, 383 U.S. 169, 172 (1966).

[20] 18 U.S.C. §201.

[21] So concluded the legal scholars who reviewed the decision of the Court of Appeals. See e.g., Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335 (1965); Note, 78 HARV. L. REV. 1473 (1965).

[22] Reply Brief of the United States, at 6, *United States v. Johnson*, 383 U.S. 169 (1966).

[23] The *only* question presented in *Johnson* was whether the Speech or Debate Clause "bars criminal prosecution of a Congressman for accepting a bribe to make a speech in Congress." Brief of the United States, at 2, *United States v. Johnson*, 383 U.S. 169 (1966). In the

the reasoning of the Court of Appeals "might be thought to bar any prosecution of a Congressman for bribery even if what the Congressman sold was his vote rather than his speech."[24] The net effect, it argued, was to cast doubt upon the federal bribery statute[25] and to undermine the constitutional power of Congress to provide for punishment of bribe-taking members.[26] This prompted the Government to argue that the antecedent conduct of accepting a bribe can be "questioned", within the meaning of the Clause, even if the influenced conduct cannot.[27] In support of these now-familiar refrains, the federal bribery statute was presented to this Court as a clear manifestation of the intent of Congress to bring corrupt members before a jury.[28] The Government perceived in *Johnson*, as it does here, a supposed "Congressional preference for criminal prosecution, rather than a legislative proceeding," thus placing "a Congressman's conduct under inquiry only if a grand jury determines that there is probable cause to believe that he has betrayed the public trust."[29]

Therefore, this Court, in deciding *Johnson*, was by no means unaware of its parallel impact upon future prosecu-

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present appeal the making of a speech in *Johnson* is not claimed to be a distinguishing factor (Govt. Br. 11 n.5).

[24] Petition of United States for Certiorari, at 7, *United States v. Johnson*, 383 U.S. 169 (1966). Brief, at 7-9, *supra* n.23.

[25] Petition for Certiorari, at 7, *supra* n.24.

[26] Brief, at 31, *supra* n.23.

[27] Petition for Certiorari, at 8, *supra* n.24; Brief, at 9-13, *supra* n.23.

[28] Petition for Certiorari, at 9, *supra* n.24; Brief, at 8, *supra* n. 23; Reply Brief, at 4-5, *supra* n.22.

[29] Petition for Certiorari, at 9, *supra* n.24; Brief, at 36-37, *supra* n.23. The Petition added: "It gives accused legislators the benefits of all the constitutional guarantees applicable in the trial of criminal cases. It provides an impartial tribunal to protect an unpopular Congressman from a politically motivated legislative tribunal. And it proceeds on the sound premise that in matters involving wrongdoing outside the halls of Congress, the courts provide a better forum

tions under the federal bribery statute. It expressly considered — and rejected — the argument that the Speech or Debate Clause does not touch prosecutions "founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe'." *United States v. Johnson, supra,* 383 U.S. at 182. Observing that the Clause, designed to prevent accountability to other branches of government, "is framed in the broadest terms," *id.* 182-183, the Court rested its conclusion upon an opinion in a century-old English case[30] "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to *anything* they may do or say in the House." *Id.* 183 (italics added). This is hardly the sort of language which opens the door to bribery prosecutions under one statute while closing it as to another.

The thrust of *Johnson* is to proscribe the examination of a legislator's motives under the guise of a bribery prosecution, under any "general criminal statute dependent upon such inquiries * * *." *Id.* 184. The opinion does not exempt the federal bribery statute, with its all-inclusive application to any "public official". Because of the central import-

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for determining guilt or innocence." Petition for Certiorari, at 9-10. (This pseudo-justification has been resurrected here. See Govt. Br. 27-29.)

[30] *Ex parte Wason*, L.R. 4 Q.B. 573, 577 (1869). Of greater significance to the present appeal was the footnote discussion (383 U.S. at 182 n.13) of *Strode's* Case, which involved a criminal prosecution in 1512 of a member of Parliament for introducing legislation in which he had a financial interest. To our knowledge no other member of Parliament (much less any member of Congress prior to *Johnson*) has since been prosecuted in a court of law for bribery or corruption in connection with his legislative duties. As the discussion in *Johnson* makes clear, Parliament later released Strode by a special bill declaring his conviction to have been utterly void and of no effect. The law of *Strode's* Case was legislatively adopted in 1667 by the formal resolutions of both Houses of Parliament. The criminal prosecution of a member for his graft-induced vote would be unthinkable today.

ance of the federal bribery statute to the Government's appeal, and its oft-repeated apprehensions as to its survival, it would have been a simple matter for this Court to have identified it as a "narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." *Id.* 185. That statute might have been contrasted with the statute under which Congressman Johnson was actually prosecuted, as if to assure the Government that it had a clear alternative for prosecuting Congressman without running afoul of the Clause. But the Court did not draw any such distinctions, not because the federal bribery statute was not a factor in *Johnson*, but because no such distinction was warranted.

We respectfully submit that the federal bribery statute should not be treated as a wedge between this case and *Johnson*. It ill-behooves the Government to disavow on this occasion the comparisons which it so deliberately drew in *Johnson*. If the mere difference in labels[31] permits the Government to prosecute the same charges under one statute but not the other, then the Speech or Debate Clause as "an important protection of the independence and integrity of the legislature", *id.* 178, is a hollow one indeed.

Few provisions of our Constitution are as sparsely litigated as that Clause. *Id.* 179. And yet this is the sixth time — the fourth during the last five years — that the Clause has been here for a new reading. We believe that this Court has already spoken with clarity and finality so that the specific application of its teachings may be safely

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[31] As this Court said in *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964), cited in *Johnson* at 383 U.S. 182 n.12: "Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations." So also, bribery.

committed to the wisdom of federal judges. Having relied upon *Johnson*, the District Court should be affirmed on that basis without engaging in a reappraisal of matters so recently considered.

B. THE SPEECH OR DEBATE CLAUSE BARS JUDICIAL INQUIRY INTO MOTIVATIONS OF A SENATOR'S VOTE OR DECISION.

1. A fundamental lack of appreciation for the Speech or Debate Clause, as a vital check upon the executive and judicial branches, pervades the Government's entire position. This is nowhere more evident than in its interesting, well-researched but unnecessary monologue upon the historic efforts in Parliament and in the colonial assemblies to secure plenary authority to discipline members for misbehavior (Govt. Br. 12-22). We need not look beyond Article I, Section 5 of the Constitution to find that either House is clothed with power to "punish its Members for disorderly Behavior." And we have very little doubt that either House of Congress may discipline a member caught selling his vote for financial reward.[32]

What we cannot understand, and cannot accept, is the strange argument that it was a dual function of the Speech or Debate Clause to curb legislative abuses as well as to insure legislative independence. On one hand, the Government declares that the "immunity conferred by the Clause was intended to prevent legislative intimidation by, or accountability to, other branches of government" (Govt. Br. 20). It endorses this Court's statement that the Clause "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). On the other hand, the Government points to the corruption and chi-

[32] See notes 36 and 68, *infra*.

canery which poisoned the halls of eighteenth century Parliament; the abuses of *lex parliamenti*; the amenability of venal members to bribe-taking; the proliferation of privileges, legitimate and bizarre; the John Wilkes episode. The second step in its argument is an assertion that the Framers "were fully aware" of "the dangers of unfettered and corrupt use of legislative power" and "were acutely troubled that this power could be grossly abused and corrupted" and worried about legislative encroachment (Govt. Br. 19-20). We believe that these concerns are plainly mirrored in the Section 5 power of each House to "punish its Members for disorderly Behavior and, with the concurrence of two thirds, expel a member."

The third step consists of an assertion that the apprehensions of the Framers over legislative abuses "coalesced in the adoption of the Speech or Debate Clause." (Govt. Br. 20) As we shall demonstrate, the Clause was adopted despite — not because — of such abuses. Indeed, this Court has found it "significant that legislative freedom was protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess." *Tenney v. Brandhove*, 341 U.S. 367, 375 (1951). As we move into the fourth step of the Government argument, the Clause as a shield of legislative immunity is translated into an instrument of affirmative power, not merely in the hands of "either House" but available for use by Congress at large. Thus we are told:

> In providing that speech or debate in either *House* 'shall not be questioned in any other Place,' it was thus not simply meant that Congress could impose sanctions on the unruly legislator or on one who violated its rules of behavior. It was also meant that *Congress* itself could punish a corrupt and venal member — that it could exercise a power that had always been one of the essential factors in the overall struggle

for legislative freedom of debate. (Govt. Br. 21) (italics added).

No authority is cited for this novel reading of the Speech or Debate Clause, much less for the purely speculative conclusion that "the Framers clearly recognized that Congress would have the authority to punish its members for acts of bribery connected with legislative duties." (Govt. Br. 22). We do not suppose that the Framers, distrustful of unicameral legislatures,[33] would have reserved specific authority in "either House" inadvisably in Sections 5 or 6 of the Legislative Article.[34] But assuming that the Framers considered punishment of acts of legislative bribery at all, the conclusion which the Government attempts to establish as the final step in its syllogism is utterly devoid of any foundation in history, logic, or precedent. The fallacy of such conclusion is exposed by its very statement:

> It is equally sound to conclude that the Framers had no objection to, and perhaps even deemed desirable, congressional use of its legislative authority under Article I, Section 1, and the "necessary and proper clause", Article I, Section 8, to enact a statute specifically providing for a trial in the courts of a member who takes a bribe; such a statute avoids the likelihood of a trial influenced by popular clamor and the lack of impartiality necessarily inherent in a legislative body where "all the passions which activate a multitude" may be felt. (Govt. Br. 22).

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[33] *The Federalist* (Nos. 51, 62 and 63 (Hamilton or Madison) (Ford ed. 1898) at 345, 412-413, 419, 423-424.

[34] Section 5 provides that "each House" shall judge the elections, returns and qualifications of its own members; that "each House" may provide penalties to compel the attendance of absent members; that "each House" may authorize the rules of its proceedings, punish members for disorderly behavior, and expel members; that "each House" shall keep a journal of its proceedings; that "neither House" shall adjourn without the consent of the other.

As a matter of historical accuracy, the concept of "a trial in the courts of a member who takes a bribe" would have been completely foreign to the Framers. Such a trial would have been without precedent. Bribery, corruption, and venality are evils as ancient as Parliament itself. Nevertheless, in the entire history of Parliament, there is not one recorded instance in which a member was hailed before a court of law on a charge of bribery in the performance of his legislative duties. Certainly the Government cites no instance and we are unaware of any.[35] Of course, bribe-taking members have been punished severely and committed to the Tower for their misdeeds, but invariably upon the judgment of Parliament itself.[36] Moreover, a charge of bribe-taking by a legislator was not an offense

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[35] The Government cites three Commonwealth cases as holding "that a legislator was amendable to trial and punishment by the courts for taking a bribe in connection with his official duties." (Govt. Br. 15, n.9). Actually, two of the cases involved the prosecution of non-legislators for attempting to bribe members of local parliaments. *Regina v. White*, 13 N.S.W. Sup. Ct. 322 (1875); *Regina v. Bunting*, 7 Ont. Rep. 524 (1885). In the third case, *Rex v. Boston*, 33 Commw. L.R. 386 (1923), a legislator was convicted of accepting bribes, but for non-legislative conduct in inducing the government to purchase certain estates. In *White* and *Boston* the privilege was not considered; in *Bunting* the bribers unsuccessfully attempted to plead the privilege of the legislators. This Court has acknowledged all three cases as "dealing with the general question of liability of legislators for bribery in distinguishable contexts." *United States v. Johnson*, 383 U.S. 169, 180 n.9 (1966). See Note, 78 HARV. L. REV. 1473, 1474 (1965).

[36] For example, in 1677, John Ashburham was expelled for receiving 500 pounds from French merchants for business done in the House. In 1694, a member (Guy) was committed to the Tower of London for taking a bribe of 200 guineas. In the same year, Sir John Trevor was declared guilty of a high crime and misdemeanor in having, while Speaker of the House, accepted a gratuity of 1000 guineas from the City of London after passage of the Orphans Bill; and was expelled. Another member (Hungerford) was expelled for receiving 20 guineas for his service as chairman of the committee on that bill. May, *Treatise on the Law, Privileges, Proceedings, and Usage of Parliament* 114 et seq. (14th ed. Campion 1946).

known to the common law, at least not in 1787 when the Constitution was drafted. Blackstone, perhaps the most respected legal commentator of the period,[37] limited the crime of bribery to occasions "when a judge, or other person concerned in the administration of justice takes any undue reward to influence his behavior in office."[38] Coke likewise regarded bribery as an offense committed by judges.[39] And, contrary to the insinuations of the Government, the Framers and their contemporaries were not so troubled by the spectre of legislative corruption as to make it an indictable offense. When the First Congress met a few years after the Constitutional Convention, the sole expression of their concern with bribery was a statute reserving criminal sanctions for judges who took bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, Section 21, 1 Stat. 112, 117. The great awakening of 1853, when Congress is said to have made it a crime for members to accept bribes,[40] occurred years after the death of the last surviving participant in the Convention.

As a matter of logic, it borders on the incredible to assume that the protection which the Framers secured to legislators with one hand they surrendered with the other. After reserving to "either House" the right to "punish its

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[37] "Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly the Framers of the Constitution were familiar with it." *Schick v. United States*, 195 U.S. 65, 69 (1904).

[38] 4 Blackstone's Commentaries 139 (5th ed. 1773).

[39] "Bribery is a great misprision, when any man in judicial place takes any fee or pension, robe, or livery, gift, reward or brocage of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the thing only, unless it be meat and drink, and that of small value." Coke, 3rd Inst. 145 (1797).

[40] Act of February 26, 1853, c. 81, 10 Stat. 170, 171.

Members for disorderly Behavior" in Section 5, the Constitution states an unequivocal prohibition: "for any Speech or Debate in either House they [Members] shall not be questioned in any other Place." These clauses are consistent with one another and were intended to be construed harmoniously.[41] In other words, either House could punish its members but, for any activity covered by the Speech or Debate Clause, they were not to "be questioned in any other Place." Since the Framers saw fit "to prevent intimidation by the executive and accountability before a possibly hostile judiciary,"[42] it can hardly be assumed that the same Framers "had no objection to and perhaps even deemed desirable" a system enabling legislators to be "questioned" in the courts.[43]

It is as a matter of constitutional precedent, however, that the Government's argument is most wanting. Indeed, it is so antagonistic to the fundamental purposes of the Speech or Debate Clause and to the policy declarations of this Court that it is difficult to understand how it can be seriously advanced. What the Government seeks from this Court is a holding that the vote, action, and decision of a Senator may be questioned in a court of law, despite the constitutional prohibition, if Congress permits it by statute. In such a situation, we are informed, "[h]is conduct is subject to censure only if a grand jury returns an indictment charging betrayal of the public trust, and the impartiality of the judicial tribunal protects him from a politically motivated judgment" (Govt. Br. 29).[44]

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[41] *Cohens v. Virginia*, 6 Wheat. 264, 393 (1821).

[42] *United States v. Johnson*, 383 U.S. 169, 181 (1966).

[43] Govt. Br. 22.

[44] This is the identical theme heard in *Johnson*. See text accompanying n.29, *supra*.

It is our firm conviction that the Framers deliberately excluded the grand jury and the judicial tribunal from the legislative arena. We believe that the Clause, as construed by this Court means simply that the conduct of a Senator is "subject to censure" in the Senate and "shall not be questioned in any other Place."

2. Whatever doubt may have at one time existed as to the origins, development and scope of the Speech or Debate Clause has been settled by the repeated decisions of this Court. *Powell v. McCormack*, 395 U.S. 486, 501-506 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967); *United States v. Johnson*, 383 U.S. 169 (1966); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Kilbourn v. Thompson*, 103 U.S. 168, 200-205 (1881). Academic forays into Parliamentary history can add little to the present meaning of the Clause. Having been examined by this Court on five previous occasions, the Clause now bears the indelible gloss of its decisions.

The Speech or Debate Clause is probably the most important guarantee of legislative independence contained in the Constitution. As such, it is a keystone of our tripartite system of government and "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, *supra*, 383 U.S. at 178. "The Speech or Debate Clause, adopted by the Constitutional Convention without debate or opposition, finds its roots in the conflict between Parliament and the Crown culminating in the Glorious Resolution of 1688 and the English Bill of Rights of 1689." *Powell v. McCormack*, *supra*, 395 U.S. at 502. The importance which the Framers attached to its provisions is summarized in *Johnson*:

> This formulation of 1689 was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the independence and integrity of the legislature. See, e.g., Story, *Commentaries on the Constitution* §866; II *The Works of James Wilson* 37-38 (Andrews ed. 1896).

United States v. Johnson, supra at 178.

The latter sources are enlightening because the authors were distinguished members of this Court during its early days. Justice Story considered legislative freedom a "great and vital privilege * * * without which all other privileges would be comparatively unimportant or ineffectual."[45] In his own evaluation of the Clause, Justice Wilson thought it "indispensably necessary" that every legislator "should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense."[46]

The legislative privilege is thus regarded as "one manifestation of the 'practical security' for ensuring the independence of the legislature." *United States v. Johnson, supra*, 383 U.S. at 179. Because of its importance, "the

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[45] Quoted in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881).

[46] Quoted in *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Tenney v. Brandhove*, 341 U.S. 367, 373 (1951). It is noteworthy that Justice Wilson was not only one of the first justices appointed to this Court but also served in the Constitutional Convention as "an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution." *Tenney v. Brandhove, supra.*

legislative privilege will be read broadly to effectuate its purposes * * *." *Id.*, 180. Liberal treatment has been accorded this provision almost from its very inception. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), this Court adopted the language of an 1808 decision which it regarded as "the most authoritative case in the country on the construction of the provision in regard to freedom of debate in legislative bodies, and being so early after the formation of the Federal Constitution, is of much weight." *Id.*, 204. The authority so revered is *Coffin v. Coffin*, 4 Mass. 1 (1808), which as the best contemporaneous source on the scope of the Clause, is here quoted at length:

> * * * [T]he article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office, without enquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the representatives' chamber. *Id.* 27.[47]

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[47] The same passage was also quoted in *Tenney v. Brandhove*, 341 U.S. 367, 373-374 (1951). Pertinent to the present case is another statement by Chief Justice Parsons: "If a member * * * be out of the chamber, sitting in committee, executing the commission of the House, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for everything said or done by him in the exercise of his functions as a

These words, spoken within a few years after ratification of the Constitution, hardly reflect the terrified fixation with legislative tyranny which the Government attributes to the Framers. Like Justices Wilson and Story, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts was doubtless aware that Parliament had weathered corrupt practices during the past century. Nor were they or their contemporaries blind to the abuses which had prevailed in England under the *lex parliamenti*, which allowed members, their retinues, their servants, and their goods to enjoy a multitude of immunities from ordinary legal restraints while new "privileges" were created at the will of Parliament.[48] The Framers were careful to abolish all prerogatives of mischief and oppression, while retaining the inherited privilege of speech and debate.[49] This most vital privilege of all "was taken as a matter of course" by the Framers, *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), and "adopted by the Constitutional Convention without debate or opposition." *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *United States v. Johnson*, 383 U.S. 169, 181 (1966).

Thus "it is significant that legislative freedom was so carefully protected by constitutional framers at a time when even Jefferson expressed fear of legislative excess."[50]

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representative in committee, either in debating, in assenting to, or in draughting a report." *Coffin v. Coffin*, 4 Mass. 1, 28 (1808).

[48] For examples, see *Watkins v. United States*, 354 U.S. 178, 188-191 (1957).

[49] "[W]hile the Framers of the Constitution did not adopt the *lex et consuetudo* of the English Parliament as a whole, they did incorporate such parts of it, and with such privileges of Parliament, as they thought proper to be applied to the two Houses of Congress. * * * One of these '[privileges] is 'that the freedom of speech and debates and proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament.'" *Kilbourn v. Thompson*, 103 U.S. 168, 201-202 (1881).

[50] In a letter cited by the Government Brief at 21, Jefferson wrote in 1789 that "[t]he tyranny of the legislatures is the most formidable

Tenney v. Brandhove, *supra* at 375. It is equally significant, we think, that eminent American jurists wise to the ways of Parliament should have been adament in granting "exemption from prosecution for everything said or done" in a legislative capacity. *Coffin v. Coffin*, *supra* at 27. If "specific obstacles had to be erected against the possible abuse of power by the Congress" (Govt. Br. 21), such obstacles were not to be placed by judges giving a narrow construction to the Speech or Debate Clause.

That all conduct relating to the functioning of Congress comes within the sweep of the Clause has never been doubted by this Court. In *Kilbourn v. Thompson*, 103 U.S. 168 (1881), after quoting the above passage from *Coffin* and declaring its views to be sound, this Court announced the rule which it has observed to this day:

> It would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to writ-

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dread at present and will be for long years." This was not Jefferson's last word on the subject, however. When a grand jury at Richmond publicly criticized members of Congress in 1797, Jefferson fired off a petition to the Virginia House of Delegates "that in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive * * *.

"That * * * for the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, * * * to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary * * * is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be * * *; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive." 7 *Writings of Thomas Jefferson* 158 (Ford ed. 1898), quoted in Luce, *Legislative Assemblies* 516-518 (1924).

> ten reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, *to things generally done in a session* of the House by one of its members in relation to the business before it. *Id.* 204.[51]

See also *Powell v. McCormack*, 395 U.S. 486, 502 (1969); *Dombrowski v. Eastland*, 287 U.S. 82, 85 (1967); *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). In sum, the Clause covers all "acts done within the sphere of legislative activity." *Tenney v. Brandhove, supra.*

Within the coverage of the Clause the jurisdiction of Congress is exclusive. The concise constitutional declaration that "for Speech or Debate in either House they [members] shall not be questioned in any other Place" is clear and unambiguous. It is unqualified in its categorical imperative — "they shall not be questioned in any other Place". It concedes no exception. The Clause proclaims the exclusive competence of the House to inquire into the legislative acts of Representatives and likewise the Senate to inquire into the legislative acts of Senators. They may not be questioned elsewhere.

This blanket prohibition was designed "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." *United States v. Johnson, supra* at 181. It is so conceded (Govt. Br. 20), but with the im-

[51] *Kilbourn* itself applied the Clause to disallow an action against Congressmen based upon their votes in favor of a resolution commanding the arrest of the plaintiff for contempt. Members of legislative bodies are held to be absolutely immune from personal liability for votes cast by them, the underlying motives being irrelevant to the unimpaired enjoyment of such privilege. See, e.g., *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237, 242-243 (D. Del. 1968), and cases cited.

plied caveat that the executive may intimidate and the courts may demand accountability if Congress enacts "a statute specifically providing for a trial in the courts of a member who takes a bribe" connected with his legislative acts (Govt. Br. 22). We deal elsewhere with this contention but its fallacy appears from the prohibition itself. Legislative power is subordinate to the Constitution and may not override an express Constitutional prohibition. *Marbury v. Madison*, 1 Cranch 137 (1803). And if the Constitution says that members "shall not be questioned in any other Place", then "they need not *answer* in any other place, including courts."[52]

3. The prohibition of the Clause is especially directed against inquiry by the courts. This concern is clearly reflected in tracing the geneology of the Clause.

> The present version of the Clause was formulated by the Convention's Committee on Style, but the original vote of approval was of a slightly different formulation which repeated almost verbatim the language of Article V of the Articles of Confederation: "Freedom of speech and debate in Congress shall not be impeached or questioned *in any court*, or place out of Congress * * *." The language of that Article, of which the present Clause is only a slight modification, is in turn almost identical to the English Bill of Rights of 1689: "That the Freedom of Speech and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court* or Place, out of Parliament." I W. & M., Sess. 2, c. 2.

United States v. Johnson, 383 U.S. 169, 177-178 (1966) (italics added).

Freedom from judicial inquiry "was deemed so essential for representatives of the people that it was written into

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[52] Opinion of Burger, J. (now Chief Justice) in *Powell v. McCormack*, 395 F. 2d 577, 602 (D.C. Cir. 1968), aff'd in part 395 U.S. 486 (1969).

the Articles of Confederation and later into the Constitution." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951). So did the States erect definite barriers to all judicial impeachment of legislators. Article VIII of the Maryland Declaration of Rights of 1776 provided that legislative freedom "ought not to be impeached or questioned *in any other court or judicature*" (italics added). Equally specific in denouncing judicial interference was the Massachusetts Bill of Rights of 1780 (Article XXI) and the Constitution of New Hampshire of 1784 (Article XXX). Each declared that the "freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action or complaint, *in any other Court* or place whatsoever" (italics added).[53] These constitutional prohibitions are indistinguishable in meaning from the federal Clause. As this Court has observed, "the general idea in all of them, however expressed, must have been the same, and must have been in the minds of the members of the Constitutional Convention." *Kilbourn v. Thompson*, 103 U.S. 168, 202-203 (1881). All had their source in the same struggle for legislative independence: all were directed against the same end; to assure that freedom against judicial encroachment. In other words, "[f]reedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney v. Brandhove*, *supra* at 372.

The consistency with which the judiciary has been constitutionally singled out for exclusion again refutes the curious notion that the Framers, by adopting the Clause, "had no objection to and perhaps even deemed desirable"

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[53] These State constitutional provisions are collected and summarized in *Tenney v. Brandhove*, 341 U.S. 367, 373-375 (1951). See generally Clarke, *Parliamentary Privilege in the American*

the concept of "a trial in the courts of a member who takes a bribe" (Govt. Br. 22). Such a concept was precisely what the Clause sought to eliminate.[54] Upon a charge of bribery, corruption, malice, sedition or criminal libel in the performance of his duties, a legislator was to be questioned by his House and not "in any other place." His official conduct was not to be "questioned" by a jury or "impeached" or "inquired into" or made "the foundation of any accusation or prosecution, action or complaint". The whole object of the Clause, as this Court has recognized, is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Powell v. McCormack*, 395 U.S. 486, 505 (1969). "It *insures* that legislators are free to represent the interests of their constituents *without fear that they will be later called to task in the courts for that representation.*" *Id.* 503 (italics added).[55]

"Legislative immunity does not, of course, bar all judicial review of legislative acts." *Ibid.* It is for the courts, in the first instance, to define the scope of the Clause and then to determine whether the contested activities fall within it. But once the activity is found within that scope, the judicial power under Article III is exhausted and the privi-

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Colonies (1943). On the eve of the Constitutional Convention, the New York legislature passed a Bill of Rights on January 20, 1787, which included a provision that legislative proceedings "shall not be impeached or questioned in any court or place out of the senate or assembly." *Tenney v. Brandhove*, *supra* at 374 n.3.

[54] Indeed, the state and federal constitutional provisions were framed with "great care to preserve the principle that the legislature must be free to speak and act without fear of criminal and civil liability." *Tenney v. Brandhove*, *supra* n.53, at 375.

[55] As Judge Youngdahl has said, "reprisal by the executive or judicial branches for what legislators say or do within the legislature must be impossible in order to obtain free discussion and consequent benefits to the public." *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960).

lege which the Clause confers is absolute. And the courts have had no difficulty in accepting the principle of complete immunity. Although referred to as a "privilege" in *Johnson*, it is also described in terms of "legislative immunity",[56] as "an absolute shield against all outside interference";[57] and as "an absolute privilege to members of both Houses of Congress in respect to any speech, debate, vote, report, or action done in session."[58] The privilege, being absolute, is plain recognition that legislators are and "should be protected not only from the consequences of litigation's results but also from the burden of defending themselves." *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967).

The fact that the same acts, if not privileged, might expose the offending Congressman to trial and civil or criminal liability has never been regarded as a basis for removing the protection of the Clause. This was quickly established in *Kilbourn v. Thompson*, *supra* 103 U.S. at 200-201, when this Court flatly declared that the defendant Congressmen would have been liable for their scheme had

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[56] *Powell v. McCormack*, 395 U.S. 486, 503 (1969); *Dombrowski v. Eastland*, 387 U.S. 82, 84-85 (1967). See also *Barsky v. United States*, 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948) ("absolute immunity"); *Shellburne, Inc. v. New Castle County*, 293 F. Supp. 237, 242 (D. Del. 1968) ("absolute immunity from liability for his vote").

[57] Yankwich, *The Immunity of Congressional Speech — Its Origin, Meaning and Scope*, 99 U. PA. L. REV. 960, 966 (1951). See also *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960) (Clause seen "as a shield against executive interference with the individual legislator").

[58] *Barr v. Matteo*, 360 U.S. 564, 569 (1959). See also *Cochran v. Couzens*, 42 F. 2d 783 (D.C. Cir.), cert. denied 282 U.S. 874 (1930) ("absolutely privileged"); *Hentoff v. Ichord*, 318 F. Supp. 1173, 1181 (D.D.C. 1970) ("total privilege"); *Lusk v. Hanrahan*, 244 F. Supp. 539, 540 (E.D. Ill. 1965) ("absolute privilege"); *McGovern v. Martz*, 182 F. Supp. 343, 346 (D.D.C. 1960) ("Thus the privilege is absolute: purpose, motive, or the reasonableness of the conduct is irrelevant.")

they not set up the protection of the Clause. It holds true today, as the Government in this very case at bar seeks to strip a Senator of his constitutional immunity by charging that his action, votes and decision on postal rate legislation were bribed.

We submit that Justice Frankfurter, speaking for the Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951), had such a situation in mind:

> The claim of an unworthy purpose does not destroy the privilege. Legislators are *immune* from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. *The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives.* The holding of this Court in *Fletcher v. Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned. * * *
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> * * * In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. *Courts are not the place for such controversies.* Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. *Id.* 377-378 (italics added).

In sum, we can find no basis in any of the prior decisions of this Court to disturb the action of the District Court.

C. CONGRESS CANNOT ENACT A STATUTE DEPRIVING MEMBERS OF THEIR CONSTITUTIONAL IMMUNITY.

1. Since the Speech or Debate Clause plainly excludes all judicial inquiry into matters within its domain, such inquiry cannot be authorized by a narrowly drawn stat-

ute passed by Congress in the exercise of its legislative power to regulate the conduct of its members," *United States v. Johnson*, 383 U.S. 169, 185 (1966), except at the expense of the constitutional prohibition written into the Clause.

The comprehensive power of Congress to enact criminal statutes of general application is not in issue here. There is certainly no contention that the power reserved to the Senate to inquire into the legislative activities of its members or to punish for misbehavior exempts a Senator from the law governing all citizens. A Senator remains liable for criminal conduct in any form, including acts of bribery, "that is in no wise related to the due functioning of the legislative process." *Id.* at 172.[59] This is the essential teaching of *Burton v. United States*, 202 U.S. 344 (1906), on which the Government places great emphasis (Govt. Br. 25). *Burton* involved a Senator convicted of receiving compensation for performing services in a proceeding before the Postmaster General. Legislative immunity under the Speech or Debate Clause, being wholly inapplicable to the situation, was neither invoked by the Senator nor discussed by the Court. It was urged that his conviction would interfere with the Senate's authority over its members and its power to punish and expel, but this Court saw "no necessary connection between the conviction of a Senator of a public offense prescribed by a statute and the authority of the Senate in the particulars named." *Id.* 367. It was plain that the discharge of legislative duties "does not require a Senator to appear before an executive department in order to enforce his particular views, or the

[59] The *Johnson* "decision does not touch a prosecution which, though as here founded on a criminal statute of general application, does not draw in question the legislative acts of the defendant member of Congress or his motives for performing them." *Id.* 383 at 185.

views of others, in respect of matters committed to that department for determination." *Id.* 368.

Unlike *Burton*, the discharge of legislative duties covered by the Speech or Debate Clause is directly in question here. *Johnson* holds, of course, "that a prosecution under a general criminal statute dependent on such inquiries necessarily contravenes the Speech or Debate Clause." *United States v. Johnson, supra*, 383 U.S. at 184-185. And thus we return to the same basic question: Whether the power of the Senate to regulate the conduct of its members enables Congress to deprive them of their constitutional immunity by enacting a statute which permits courts to question their motivations, deliberations, votes and decisions upon congressional matters.

In addition to the basic legislative power vested in the Congress,[60] the Senate and the House of Representatives, are each cloaked with separate authority under Section 5 of the Legislative Article to "be the Judge of the Elections, Returns, and Qualifications of its own Members,"[61] and to "determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member."[62] These Section 5 powers are plenary and not dependent upon the broad legislative grant contained in Section 1. The power to "judge", to "determine" and to "punish" is vested in each House, and not the Congress at large. See *Kilbourn v. Thompson*, 103 U.S. 168, 183 (1881). The Senate, for example, "is fully empowered and may determine such matters *without the aid of the House of Representatives or the Executive or Judicial Department.*" *Reed v. County Commissioners of Del-*

[60] Article I, Section 1.

[61] Article I, Section 5, Clause 1.

[62] *Id.* Clause 2.

aware County, Pennsylvania, 277 U.S. 376, 388 (1928) (italics added).

In exercising its Section 5 power to "punish its Members for disorderly Behavior", can the Senate enlist the aid of the House or the executive or the judiciary? Although the Senate may certainly join with the House to enact implementing legislation, such as might be necessary to secure the attendance of witnesses, it is extremely doubtful whether the crucial determination itself may be delegated by statute to the judiciary. This Court has seldom had occasion to examine the disciplinary power under Section 5. See *Powell v. McCormack*, 395 U.S. 486 (1969); *McGrain v. Daugherty*, 273 U.S. 135, 172 (1927); *Marshall v. Gordon*, 243 U.S. 521, 536 (1917); *In re Chapman*, 166 U.S. 661, 668-670 (1897); *Kilbourn v. Thompson*, 103 U.S. 168, 182, 189-190 (1881); *Anderson v. Dunn*, 6 Wheat. 204, 232-233 (1821). Not one of these decisions lends encouragement for the proposition, advanced here, that the punishment of Congressmen and their expulsion are matters for the courts to adjudicate in the first instance.[63] Wholly

[63] *Powell v. McCormack*, 395 U.S. 486 (1969), is certainly not a decision to the contrary: The holding was premised upon a determination that the House of Representatives, by its own deliberations and vote, had excluded,— not expelled — Congressman Powell. This Court declined to "speculate what the result would have been if Powell had been seated and expulsion proceedings subsequently instituted." *Id.* 508. Moreover, no view was expressed on what limitations may exist on Congress' power to expel *or otherwise punish a member* once he has been seated." *Id.* 507 n.27 (italics added). In *Powell*, the Court held that the Constitution does not give the House of Representatives judicially unreviewable power to set qualifications of membership but that its adjudicative function is limited to judging whether prospective members meet those qualifications enumerated in the Constitution. *Id.* 520, 547-548. Consistent with this interpretation, federal courts might still be barred from reviewing the House's factual determination that a member did not meet one of the standing qualifications. It was implicit throughout the opinion that the powers conferred by Section 5 are beyond judicial cognizance except where their exercise violates other constitutional inhibitions; in all other respects the House is "sole judge". See *id.* 552 (Douglas, J., concurring).

apart from the constitutional objections arising under the Speech or Debate Clause, the strong tradition of legislative self-discipline before and after 1787 argues against any implied power of delegation.[64] It is unthinkable that those who drafted the Constitution, after centuries of struggle for legislative independence, would have confided specific but separate grants to the Senate and to the House with the expectation that the actual power would devolve instead upon the judiciary.[65]

The conclusion is inescapable that the Constitution vests the power to punish or expel in each House with the plain implication that it will be exercised there, not in a courtroom pursuant to a joint Act of Congress. Indeed, the Constitution does not entrust Congress with a general supervisory power over its two components. *Kilbourn v. Thompson*, 103 U.S. 168, 183 (1881).

> That instrument, however, is not wholly silent as to the authority of the *separate* branches of Congress to inflict punishment. It authorizes *each* House to punish its *own* members. *Ibid* (Italics added).

In its first encounter with that Section 5 provision, this Court recognized "that the exercise of the powers given over their own members was of such a delicate nature that a constitutional provision became necessary to assert or communicate it." *Anderson v. Dunn*, 6 Wheat. 204, 233 (1821).[66] Matters of such "delicate nature" contemplate that each branch of Congress will exercise its own inde-

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[64] See episodes summarized in Govt. Br. 13-19.

[65] As this Court has said: "Courts are not the places for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951).

[66] Certainly the Constitution did not intend that the judicial branch exercise a power which the Constitutional Convention expressly refused to vest in the whole Congress.

pendent judgment by imposing punishment on a case-by-case basis, rather than by formulation of a rule of law to be applied to its members in a judicial tribunal. In the case of Senators, the power to punish or expel thus "extends to all cases where the offense is such *as in the judgment of the Senate* is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U.S. 661, 669-670 (1897) (Italics added). Over the years members have been censured, fined, and expelled[67] on a variety of grounds,[68] but the discretion to proceed against a Senator under Section 5 has always remained exclusively in the hands of the Senate.

In short, we submit that the Senate has a non-delegable constitutional obligation to decide for itself whether its members will be subjected to punishment or expulsion. Neither the Senate nor the Congress may constitutionally legislate away this vital function, by a narrowly drawn

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[67] Imprisonment may be imposed by the Senate in appropriate cases. *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881).

[68] Including the acceptance of bribes and emoluments. See II Hinds', *Precedents of the House of Representatives* §1236 et seq. (1907). In 1873, for example, a House investigated the fact that Congressman Oakes Ames had distributed a quantity of stock among influential members as a precaution against congressional inquiry into the affairs of Credit Mobilier, a railroad holding company. As a leading historian has said, the stock "was, in truth, intended as a bribe. It *was* a bribe." Bowers, *The Tragic Era: The Revolution After Lincoln* 396 (Houghton-Mifflin ed. 1962). The scandal touched the Vice-President, Vice-President-elect, the Chairmen of the most important committees of the House, and the floor leader of the minority party in the House. The shocking disclosures linked nine members of Congress to the scheme. The House ultimately censured Congressmen Ames and Brooks, after expulsion attempts failed. *Id.* 396-404. See II Hinds, *supra* at §1286. There is no record of any indictments growing out of this sordid episode. This Court once reviewed a Senate investigation into charges that Senators had been speculating in sugar stocks during the consideration of a tariff bill pending before them. *In re Chapman*, 166 U.S. 661, 663 (1897). The charges were held to be "within the jurisdiction of the Senate" under Section 5. *Id.* 669.

statute or otherwise.[69] These conclusions are strengthened by the realization that Section 5 powers, in a very real sense, "are not legislative, but judicial in character." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929). In exercising such powers, "the Senate acts as a judicial tribunal" and its power to adjudge "is in no wise inferior under like circumstances to that exercised by a court of justice." *Id*, 616. For example, while acting within the constitutional limits assigned to it, the Senate passes upon contested elections to that body, exclusive of any tribunal, including the courts.[70] In determining the rules of

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[69] One writer, addressing himself to the "narrowly drawn statute" question posed in *United States v. Johnson*, 383 U.S. 169, 185 (1966), has concluded that "the clear and irrefutable logic of [the *Johnson*] decision leads to the inescapable conclusion that Congress must in some way deal with these problems [of legislative wrongdoing] itself and cannot delegate away its exclusive jurisdiction to regulate the legislative conduct of its members." Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 SUFFOLK U.L. REV. 1, 41 (1968). "If the legislature is held to be the exclusive forum for the trial and punishment for legislative misconduct and misbehavior, then serious questions exist as to the ability of the legislature to delegate to others its power to try and punish its own members, regardless of how precisely it may endeavor to define the specific nature of the offense. Privilege, moreover, as we have seen, inheres in the individual legislator and not in the collective body. It cannot, therefore, be delegated away." *Id*. 41-42.

[70] *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 619 (1929). See also *Jones v. Montague*, 194 U.S. 147, 153 (1904) ("sole judge"); *Sevilla v. Elizalde*, 112 F. 2d 29, 32, 37 (D.C. Cir. 1940); *Rogers v. Barnes*, 474 P. 2d 610 (Colo. 1970); *Laxalt v. Cannon*, 80 Nev. 388, 397 P. 2d 466 (1964); *Odegard v. Olson*, 264 Minn. 439, 119 N.W. 2d 717 (1963); *Wettengel v. Zimmerman*, 249 Wis. 237, 24 N.W. 2d 504 (1946). "The many volumes of election contest cases in which every conceivable question has been raised with reference to the right of persons to sit as members of Congress, together with the fact that there are no court decisions to be found controlling such matters, bear mute but forcible evidence that this court has no authority to be the judge of the manner in which such members were elected * * *." *Keogh v. Horner*, 8 F. Supp. 933, 935 (S.D. Ill. 1934).

proceedings; in accordance with the same clause of the Constitution which authorizes punishment and expulsion, the Senate may not ignore constitutional restraints but, subject only to these limits, its power under that clause is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892).

Within this non-delegable category falls the power to punish or expel. That power was specifically identified by this Court when it said "that the powers confided by the Constitution to one of these departments cannot be exercised by another." *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881). In this separation of powers context, the authority to discipline members confided in the Senate may not be exercised elsewhere. The power unquestionably entails the informed judgment of the Senate as a precondition to its exercise. Cf., *In re Chapman*, 166 U.S. 661, 669-670 (1897). As is the case of the other Section 5 powers, the exercise by the Senate of its power to punish "necessarily involves the ascertainment of facts, the attendance of witnesses, the examination of such witnesses, with the power to compel them to answer pertinent questions, to determine the facts and apply the appropriate rules of law, and, finally to render a judgment which is beyond the authority of any other tribunal to review." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613 (1929).[71]

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[71] We do not overlook the fact that this quotation from *Barry* is regarded as dictum. *Powell v. McCormick*, 395 U.S. 486, 519 n.40 (1969). This Court indicated that the language in *Barry* must be qualified in one important respect but did not otherwise question its authority. *Barry*, as modified by *Powell*, means simply that only the Senate can initiate disciplinary action against a member but that such action is not automatically immune from judicial review to determine its constitutionality. Indeed, as the Court recognized in *Powell*, *supra* at n.40, *Barry* itself conditioned the exercise of Senate power "to the restraints imposed by or found in the implications of the

2. Our conclusions with respect to the Senate's power under Section 5 are derived without reference to the prohibition against outside inquiry contained in the Speech or Debate Clause. If our interpretation of Section 5 is correct, then there is no unnecessary conflict with Section 6. The regulation of the conduct of Senators, as well as expulsion, may be regarded as functions vested in the Senate to the exclusion of the judiciary. Under this harmonious construction, and consistent with the separation of powers doctrine, Senators may be punished by the Senate for misconduct in the performance of their legislative duties but "they shall not be questioned in any other Place."

This analysis is supported by a recent study completed by the Association of the Bar of the City of New York. Referring to *United States v. Johnson*, 383 U.S. 169 (1966), the report indicates the proper relationship between disciplinary power and legislative privilege:

> The judicial rulings in the *Johnson* case point up the importance of Congress' using its own disciplinary powers. Such matters as a bribe-induced speech or vote are insulated from criminal prosecution as a part of a Constitutional scheme to protect the independence of the Legislative Branch. As a corollary, it was empowered and expected to keep its houses clean by using its powers to expel and punish for misbehavior.[72]

Constitution." *Id.* 279 U.S. at 614. This thoroughly reinforces our own view that the power to regulate the conduct of Senators, *United States v. Johnson*, 383 U.S. 169, 185 (1966), which is not truly a legislative power of Congress, is subject to the restraints imposed by the Speech or Debate Clause as to the questioning of members outside the Senate.

[72] Kirby, *Congress and the Public Trust* 23 (1970). The same interrelationship has been identified in earlier commentaries. See Bishop, *Commentaries on the Non-Contract Law* §§775-778, at 360-361 (1st ed. 1889).

3. Members of either House cannot be "questioned in any other Place" within the meaning of the Speech or Debate Clause. It is implicit that the Senate can question a member in respect of his legislative conduct, just as it is explicit under Section 5 that it is empowered to punish or expel him. To question a Senator is to perform an adjudicative function which Section 6 of the Legislative Article vests in the Senate to the exclusion of the judiciary. As our previous discussion makes clear these conclusions seem unchallengable.

The Government insists that the unfettered power to punish members for misbehavior, including the acceptance of a bribe in exchange for legislative conduct, is vested in Congress (Govt. Br. 23-24). On this assumption the Government argues that Congress can exercise such power by enacting "a narrowly drawn statute" empowering the regular judicial tribunals to inquire into such behavior. In this fashion, the barriers erected in *United States v. Johnson*, 383 U.S. 169 (1966), would be lowered and legislative conduct would be opened to executive and judicial scrutiny.

Conceding the full extent of this assumed power of Congress, the argument is so afflicted by a fatal defect that we need not further examine its premises. The complete answer is that it is the Constitution, not the Congress, which is the source of the legislative privilege. As this Court said most recently in *Powell v. McCormack*, 395 U.S. 486 (1969):

> Our cases make it clear that the legislative immunity created by the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task for that representation. *Id.* 503.

That insurance, which protects the electorate as the primary beneficiary, cannot be withdrawn by Congress. Con-

duct within the coverage of the Clause remains immune. As the Government is so fond of saying,[73] Congress is not endowed with the *lex parliamenti* of England. *Watkins v. United States*, 354 U.S. 178, 192 (1957); *Kilbourn v. Thompson*, 103 U.S. 168, 199 (1881); *Anderson v. Dunn*, 6 Wheat. 204, 231 (1821). Without such omnipotence Congress is in no position to expand, contract or otherwise vary the limits of the privilege vested in its members. *Watkins v. United States, supra* at 188; *Tenney v. Brandhove*, 341 U.S. 367, 376-377 (1951). Just as Congress may not acquire power by an unwarranted extension of privilege or by creating new ones, neither may it abolish or abridge a privilege secured to its members by the Constitution.[74]

We again refer to *Coffin v. Coffin*, 4 Mass. 1 (1808), which this Court has acknowledged as the first and "perhaps the most authoritative case in this country" on the Speech or Debate Clause.[75] *Coffin* speaks persuasively on the question of whether a legislative body can constitutionally alter the scope of the Clause. In that case, a question arose as to whether the Clause should be interpreted in the light of a limiting resolution passed by the Massachusetts legis-

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[73] Govt. Br. 15-16, 22 n.22, 26. See also Brief of United States, at 24 n.21, 34-36, *United States v. Johnson*, 383 U.S. 169 (1966).

[74] One of the most disgraceful aspects of the John Wilkes affair, discussed in the Govt's. Brief (at 16-17, 19-20), was the exercise by the royally-controlled House of Commons of the *lex parliamenti* to deprive Wilkes of his legislative privilege and thereby assure his conviction by the King's Bench for seditious libel. See *Powell v. McCormack*, 395 U.S. 486, 527-531 (1969). As a leading historian has written, Commons "withdrew the shield of privilege in order to justify a judicial decision contrary to law and usage, and then, not content with expelling the obnoxious member, proceeded illegally to deprive the electors of Middlesex of their free choice of a representative." Taswell-Langmead, *English Constitutional History* 652 (10th ed. 1946).

[75] *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). The construction placed upon the Constitution by judges who were contemporary with its formation is not merely entitled to very great

lature.[76] Responding for a unanimous Court, Chief Justice Parsons said:

> In considering this article [of the Constitution], it appears to me that the privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the House. For he does not hold this privilege at the pleasure of the House; but derives it from the will of the people, expressed in the Constitution, which is paramount to the will of either or both branches of the legislature. * * * Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature. *Id.* 27.[76]

Since the constitutional protection afforded by the Speech or Debate Clause is intended to secure to the people the right to representation free from judicial or executive interference, it is clear that Congress cannot waive this prohibition by an enactment subjecting its members to prohibited questioning any more than Congress can alter any other part of the Constitution by legislation. *Marbury v. Madison*, 1 Cranch 137, 177 (1803). Congress cannot empower courts by statute to question the legislators any more than it can empower courts to attain other forbidden ends. For example, the Constitution says: "No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on confession in open C[illegible]

> Here the language of the constitution is addressed especially to the courts. It prescribes directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one

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weight; "it is almost conclusive." *Fairbank v. United States*, 181 U.S. 283, 309 (1901); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 57 (1884).

[76] See n.69, *supra*.

[77] Consttiution, Article III, §3, Clause 1.

witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act? *Id*, 179.

It is similarly inconceivable to us that legislative immunity can be subordinated to a well-intentioned Act of Congress abolishing legislative immunity in certain instances while retaining it in others. An executive charge of venality would thus become the touchstone of judicial accountability. However "narrowly drawn" the encroachment, it would necessarily erode the principle that Congressmen should not be "distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Powell v. McCormack*, 395 U.S. 486, 505 (1969). Under such a statute the privilege secured by the Clause would be contingent upon a grand jury's evaluation of unworthy purpose or corrupt motives — precisely what this Court has declared to be constitutionally impermissible. "The privilege would be of little value if [Congressmen] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculations as to motives." *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951).

When constitutional power impinges upon some basic value secured by another provision of the Constitution, such power must yield. As this Court said recently in *Williams v. Rhodes*, 393 U.S. 23 (1968):

> * * * [T]hese granted powers are always subject to the limitation that they may not be exercised in a way that violates other specific provisions of the Constitution. For example, Congress is granted broad power to "Lay and collect Taxes", but the taxing power, broad as it is, may not be invoked in such a way as to violate the privilege against self-incrimination. *Id*, 29.

Nor can Congress constitutionally warrant a judicial inquiry into matters of conscience privileged under the Speech or Debate Clause, any more than it can take away or replace any other constitutional privilege. Giving full play to the powers conferred by Section 5 to discipline Members, this Court would be "no less obliged to heed the limitations placed upon those powers by the Constitution's other commands." *Haynes v. United States*, 390 U.S. 85, 98 (1968). See *Apthekes v. Secretary of State*, 378 U.S. 500, 509 (1964).

We do not suppose that a Senator could be punished or expelled by his colleagues for unburdening himself of an impassioned harrangue on an unpopular cause, much less placed on trial in a court of law under a delegation of such assumed power. Cf., *Bond v. Floyd*, 385 U.S. 116 (1966).[78] "Legislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them, and be better able to assess their qualifications for office, also so they may be represented in governmental debates by the person they have elected to represent them." *Id*, 136-137. In formulating their positions and in voting on matters pending before them, legislators cannot be deprived by Act of Congress of that "Freedom of speech and action in the legislature * * * deemed so essential for representatives of the people that it was written into * * * the Constitution." *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

To deny to Congress the authority to legislate away the privilege of its members is not to disparage its comprehensive legislative powers under Sections 1 and 8 or the powers

[78] See *Powell v. McCormack*, 395 U.S. 486, 522 (1969) (Douglas, J., concurring). "Members of Congress have the same right to speak as anyone else." *Hentoff v. Ichord*, 318 F. Supp. 1175, 1179 (D.D.C. 1970).

reserved to its coordinate branches under Section 5. If any doubt remains on the subject, one need look no further than *Powell v. McCormack*, 395 U.S. 486 (1969), which so recently held that the plenary authority to judge the qualifications of members does not permit legislative action to exclude any person, duly elected by his constituents, who meets all the qualifications prescribed in the Constitution. *Id*, 522. For Congress to prescribe additional qualifications by statute would constitute a usurpation of power. Likewise, the other exclusive and adjudicative powers vested in the House and the Senate by Section 5 are qualified by other constitutional provisions in general and by the prohibition of the Speech or Debate Clause in particular. Thus the Senate may judge the elections and "render a judgment which is beyond the authority of any other tribunal to review" under Section 5, "subject only to the restraints imposed by or found in the implications of the Constitution." *Barry v. United States ex rel. Cunningham*, 279 U.S. 597, 613, 614 (1929). Similarly, each House may determine its rules of proceedings, and its power in this respect is "absolute and beyond the challenge of any other body or tribunal"; yet it "may not by its rules ignore constitutional restraints or violate fundamental rights." *United States v. Ballin*, 144 U.S. 1, 5 (1892). We perceive no reason why the assumed power to regulate the conduct of Senators should not be limited by the same instrument from which such power is derived.

4. On a more fundamental plane, the Government's position is impaled on the separation of powers doctrine. *Johnson* establishes that the Speech or Debate Clause, apart from preserving the legislative privilege, "serves the additional function of reinforcing the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966). Moreover, "the in-

stigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause." *Id.* 182. The importance of the Clause in the tripartite system of Government can scarcely be minimized. "The Clause is the only constitutional provision wherein the doctrine of separation of powers is explicit and its history indicates that any matter concerning either House of Congress should be examined and adjudged in the House to which it relates, and not elsewhere." *Stamler v. Willis*, 287 F. Supp. 734, 738 (N.D. Ill. 1968), rev'd on other grounds 415 F. 2d 1365 (7th Cir. 1969).

The express constitutional prohibition against outside questioning of Congressmen is an explicit exception to the general grant of judicial power to the courts in Article III of the Constitution.[79] This denial to the judiciary of a function which is essentially adjudicative is by no means unique to the Speech or Debate Clause. In addition to the Section 5 powers discussed *supra*, the Senate "shall have the sole Power to try all impeachments."[80] We doubt that the Senate, in the exercise of its sole power, could combine with the House of Representatives, which has "the sole Power of Impeachment",[81] to pass a statute delegating such power to the courts.[82] It is also beyond the com-

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[79] Supportive of this conclusion are, e.g., Scharpf, *Judicial Review and the Political Question — A Functional Analysis*, 75 YALE L.J. 518, 540 (1966); Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 12 (1959). Compare *Powell v. McCormack*, 395 U.S. 486, 513-514 (1969).

[80] Constitution, Article I, §3, Clause 6. See *Kilbourn v. Thompson*, 103 U.S. 168, 190 (1881).

[81] Constitution, Article I, §2, Clause 5.

[82] Cf., *Chandler v. Judicial Council of Tenth Circuit*, 398 U.S. 74, 136-137, 140-141 (1970) (Douglas, J., concurring). See n.84, *infra*.

petence of Congress to enable courts to give advisory opinions, e.g. *Muskrat v. United States*, 219 U.S. 346 (1910), or to decide moot cases, *United States v. Evans*, 213 U.S. 297 (1909).

By the same token, power which the Constitution denies to the judiciary cannot be conferred upon it by Congress. It is not merely a question of the extent of the power vested under the Speech or Debate Clause. That power, whatever its limits, cannot be delegated to the courts because "they are incapable of receiving it." *American Insurance Company v. Canter*, 1 Pet. 511, 546 (1828). It is a fundamental limitation, implicit in the division of powers, "that a power definitely assigned by the *Constitution* to one department can neither be surrendered nor delegated by that department, nor vested by *statute* in another department or agency." *Williams v. United States*, 289 U.S. 553, 580 (1933) (court's italics). See *United States v. Brown*, 381 U.S. 437, 443 (1965); *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881).

5. The Government argues here, exactly as it did five years ago in *Johnson*,[83] that "[s]ound considerations of policy support the authority of Congress to provide for judicial trials of corrupt members" (Govt. Br. 26-27). It is said that "legislative machinery is not geared to resolve the sensitive issues of guilt or innocence"; that the punishment is too light; that a trial by the Senate "is apt to be influenced by political factors extraneous to considerations of justice", and that "politically independent judges and juries" are more suited to the task of ruling upon "blameworthiness" (Govt. Br. 27-28). The Speech or Debate Clause is vindicated by judicial proceedings, concludes the Government because:

[83] See n.29, *supra*, and accompanying text.

> His conduct is subject to censure only *if a grand jury returns an indictment* charging betrayal of the public trust, and the impartiality of the *judicial tribunal* protects him from a politically motivated judgment. Concomitantly, the use of the *judicial process* promotes public confidence in the integrity of Congress since such a procedure evinces a deliberate legislative decision to try one of its own in a nonpolitical forum *over which it has no control* (Govt. Br. 29) (italics added).

These arguments do not improve with age. Indeed, they come 184 years too late.[84] These remonstrations in opposition to the Speech or Debate Clause, and the history and principles of legislative independence on which it is based, were not heard in 1787, were rejected in 1966, and should not be reconsidered now. The adoption of the Clause "as a matter of course by those who severed the Colonies from the Crown and founded our Nation"[85] "with-

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[84] Against such objections the Constitutional Convention designated the Senate as the appropriate forum for the trial of impeachments. *The Federalist*, Nos. 65, 66 and 81 (Hamilton) (Ford ed. 1898), at 433-446, 542-543. To the detractors of legislative trials, who championed a "nonpolitical" judicial court of impeachments, Hamilton gave this reply (*id*, No. 65, at 435):

"The Convention, it appears, thought the Senate the most fit depository of this important trust. Those who can best discern the intrinsic difficulty of the thing will be least hasty in condemning that opinion, and will be most inclined to allow due weight to the arguments which may be supposed to have produced it.

"What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? If this be the design of it, who can so properly be the inquisitors for the nation as the representatives of the nation themselves? * * *

"Where else than in the Senate could have been found a tribunal sufficiently dignified or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation* to preserve, unawed and uninfluenced, the necessary impartiality between an individual accused and the *representatives of the people, his accusers?*" (Italics in original.)

[85] *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951).

out discussion and without opposition,"[86] stands as a lasting refutation of any judicial competence in the arena served by the Clause. It is inconceivable that the Constitution, with its definite assurance that members of either House "shall not be questioned in any other Place," would also suffer Congress to turn members over to "a nonpolitical forum over which it has no control." In evaluating the imaginative guilt-fixing scheme concocted by the Government, how ironic it seems that the Senate is given no voice at all in proceedings against one of its members!

This assuredly was not the plan created by the architects of our Constitution. Legislative immunity (with its corollary prohibition against judicial inquiry) was adopted to reinforce "the separation of powers so deliberately established by the Founders." *United States v. Johnson*, 383 U.S. 169, 178 (1966).

> This "separation of powers" was obviously not instituted with the idea that it would promote governmental efficiency. It was, on the contrary, looked to as a bulwark against tyranny.[87]

If smooth-functioning judicial machinery was excluded from the realm of the Clause, it was with the realization that legislators are called upon to deliberate and make political decisions which invite suspicions and allegations of improper motive. It is their responsibility, as elected representatives of the people, to be influenced at every turn. Owing loyalty to constituents of varying persuasions, and obliged to satisfy their needs and to serve their special interests, they hold themselves open to all manner of suggestions, methods, and techniques. They are approachable and they are approached, often in secrecy and under circumstances ambiguous enough to excite the sus-

[86] *United States v. Johnson*, 383 U.S. 169, 177 (1966).
[87] *United States v. Brown*, 381 U.S. 437, 441 (1965).

picions of a grand jury, perhaps instigated by an unfriendly Government attorney developing "inferences" from facts susceptible of different meanings.

Political conduct calls for political judgments.[88] It is manifest that the Framers deliberately eschewed inquisitions in the courtroom in favor of unlimited freedom of speech and action by Congressmen as the most effective assurance of an electorate served by independent lawmakers. To that end the Speech or Debate Clause embodies the public policy of our Nation and should be liberally construed. *Cochran v. Couzens*, 42 F. 2d 783, 784 (D.C. Cir.), cert. denied 282 U.S. 874 (1930). We believe with Justice Frankfurter, that:

> In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.[89]

6. To the extent that a provision of the Constitution requires justification at all as a precondition to its liberal application, we submit that "sound considerations of policy" point away from the Government's position. Unlike *all* officers of the executive and judicial branch, with the lone exceptions of the President and Vice President, members of Congress are elected to office. They must of

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[88] *Barsky v. United States*, 167 F. 2d 241, 250 (D.C. Cir.), cert. denied 334 U.S. 843 (1948). It has been said "that the political nature of the privilege calls for a politically determined penalty." Note, 78 HARV. L. REV. 1473, 1474 (1965).

[89] *Tenney v. Brandhove*, 341 U.S. 367, 378 (1951). As Chief Judge Sobeloff observed in the *Johnson* case, it was the House and the Senate which "the Founders thought could be trusted to deal fairly with an accused member and at the same time do so with proper regard for their own integrity and dignity." *United States v. Johnson*, 337 F. 2d 180, 190 (4th Cir. 1964), aff'd 383 U.S. 169 (1966).

necessity rely heavily upon gifts in the form of political campaign contributions to finance the constantly rising costs of political campaigns requiring access to the various forms of mass communications media. This, as well as an awareness that a Senator may be swept out of office at any election, has made it mandatory for them to trade votes, compromise, defend special interests, and look after their constituents.[90]

The acceptance of a gift or a political campaign contribution by a member of Congress is not inherently unethical or dishonest even if it bears some relationship to

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[90] "In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The Congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state Congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer Senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.

"Furthermore, no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the Congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that Congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so." The Association of the Bar of the City of New York, *Conflict of Interest and Federal Service* 13-16 (1960). See Note, 78 HARV. L. REV. 1475-1476 (1965).

an official act such as his vote. Positions taken with the hope and even the immediate prospect of campaign contributions must be countless. Who in the United States Senate has not been influenced in the performance of his legislative acts by outside persons, organizations, or interests? Undoubtedly there have been innumerable instances of Senators and Representatives who have espoused causes and received some related compensation in an infinite variety of forms, i.e., presidential patronage, promises of political support and political contributions.[91]

These facts of political life suggest that a power in the hands of the executive to indict a Senator on the ground that a political campaign contribution or a political commitment of value was the true motivation for a vote in the Senate would be a very great power indeed. To give the executive branch this weapon it seeks to wield would

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[91] These considerations are ably expressed by a dissenting judge in *Regina v. Bunting*, 7 Ont. Rep. 524 (1885), involving a conspiracy to bribe members of the provincial parliament. The defendants, none of whom were members, attempted to raise the privilege but the majority refused to extend it to them. The dissenting judge would have dismissed the indictment even on motion by non-legislators:

"[T]he 'log rolling' at the various legislatures of the United States, and the 'lobbying' at our own legislatures, afford instances numerous and various of the means by which members have been induced to vote as they would not have voted, had they not been influenced by special means of a personal, and not seldom of a selfish character.

"That it has been so in the past, and is likely to be so frequently in the future, is to be deplored as an evil; but I fear it is one of the evil results of the imperfection of human nature for which there is no absolute remedy within man's power. The Constitution requires, very properly, the very nature of parliamentary business requires, that the communication between members of Parliament and their constituents should be free from restraint of any kind, and quite unrestricted by arbitrary rules. The intercourse between the public at large, as well as his constituents, and him, is also free, and he is liable to be influenced more or less in his conduct by their opinions and expressed wishes in all public and in many private matters. Thus he is constantly in contact with parties outside of Parliament, and in the way of being influenced by them in various ways, and by ways and devices not always patent, but seductive, and sometimes, when

create a substantial obstacle to the exercise of independent judgment and courage by a legislator. If the executive branch is given such a power of intimidation, it would gain a club to hold over the head of each member of Congress who gives favorable consideration to any measure whose proponents have contributed to his campaign.

If such charges as here involved[92] can be leveled at a member of the Congress, then the investigative apparatus of the executive can proceed to inquire into the motivation of any Senator. Agents of the Federal Bureau of Investigation may intrude themselves into the halls of the Congress and the Senate Office Building, interview staff personnel, contributors to Congressional campaigns, and others — all for the purpose of ferreting out whether con-

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properly regarded, corrupt. The promise of office is not infrequently used as a baited hook with effect. Dinners, wine, and jovial intercourse open the way to confidence with the usual results of undue and frequently corrupt influence. The direct offer of money is probably seldom resorted to in such cases, and it may probably be not unfairly presumed that it never is resorted to unless it be known or shrewdly suspected that the member is liable to temptation of that kind. But, however, this may be, the practice of bribery is many-sided, and bribery is effected or attempted in various ways. * * *

"It is undoubtedly an offense to bribe or attempt to bribe a public officer to do amiss, or leave undone anything in the discharge of his duty. But a member of Parliament is not a public officer. He is a legislator — is a representative immediately of a certain body of people limited to a certain portion of territory within the realm, and indirectly of the realm. His duties are neither executive, nor administrative, but deliberative. His mission is to discuss, deliberate, and legislate. To do this properly his intercourse with his constituents and the public, in the most extensive sense of the terms, must be free and unrestrained. He is therefore necessarily the sole judge of what he may hear and entertain, and how he may be persuaded, subject only to such limits and regulations as are imposed by the law and the usage of Parliament for the preservation of the honor of the member, and the dignity of Parliament; and herein the Courts are not permitted to interfere." *Id.* at 564-65, 568-69.

[92] The present indictment charges the appellee with receiving funds from a lobbyist for himself and for an entity described as the "D.C. Committee for Maryland Education" (A. 1-5).

templated action by a Senator is being made, or influenced, by improper or unethical or dishonest motives. Such an investigation, without more, should be deemed an intolerable affront to the privilege secured by the Speech or Debate Clause.

As this Court said in its latest encounter with the Clause, legislative immunity "insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation." *Powell v. McCormack*, 395 U.S. 486, 503 (1969). Fear of a charge by indictment and subsequent trial, with the prospects of ultimate vindication perhaps years away, may be itself so devastating as to produce an evil far worse than bribery. With the power of the grand jury at its disposal, the executive could itself influence and indeed control the votes of a suspected member on issues critical to the administration. Surrender of legislative independence would thus become the *quid pro quo* for legislative immunity, as was the case in eighteenth-century England when it was the Crown that did the bribing. This must not happen here by loosening the fabric of the Speech or Debate Clause.

D. THE FEDERAL BRIBERY STATUTE, 18 U.S.C. §201, IS NOT A NARROWLY DRAWN STATUTE.

We turn now to the issue which the Government urges upon this Court, i.e., whether the federal bribery statute, 18 U.S.C. 201, meets the constitutional standard suggested in *United States v. Johnson*, 383 U.S. 169, 185 (1966), of "a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." (Govt. Br. 29). The question was left open in *Johnson* "for consideration when the case arises," and, as we have explained, we do not regard this as the proper

case. We have also dealt at length with the supposed power of Congress "to regulate the conduct of its members" by statute and have concluded that such power is wanting as against a claim of privilege under the Speech or Debate Clause.

Putting these considerations to one side, it remains to be seen whether §201, is a "narrowly drawn statute" within the contemplation of *Johnson*. Although *Johnson* did not define what is meant by a "narrowly drawn statute", this Court has employed the term repeatedly in a First Amendment context, including twice during the term *Johnson* was decided. See, e.g., *Ashton v. Kentucky*, 384 U.S. 195, 201 (1966); *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966). See also *Whitehill v. Elkins*, 389 U.S. 54, 62 (1967); *Cantwell v. Connecticut*, 310 U.S. 296, 311 (1940). The First Amendment analogy is somewhat imperfect, in view of the differing background and aims of the Speech or Debate Clause, but the formulation in *Whitehill* may well serve as a rough definition of what is *not* "narrowly drawn":

> The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find an overbreath that makes possible oppressive or capricious application as regimes change. *Id.* 389 U.S. at 61-62.

Moreover, in a First Amendment context, this Court has indicated that overbreadth is measured by the whole range of possibilities, not merely by what has happened in the individual case before it. *United States v. Robel*, 389 U.S. 258, 265-266 (1967). This was emphasized in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), in language which has present relevance:

> * * * [I]n appraising a statute's inhibitory effect upon [First Amendment] rights, this Court has not hesi-

> tated to take into account possible applications of the statute in other factual contexts besides that at bar. * * * The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. * * * These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. * * * [G]overnment may regulate in the area only with narrow specificity. *Id.* at 432-433.[93]

The unmistakable connotation is thus one of precision in defining the conduct to be regulated. In the analysis of overbreadth it is of scant importance that Congress, in enacting 18 U.S.C. §201, chose to include its members by express mention rather than by implication. For the purpose of §201:

> "public official" means Member of Congress, or Resident Commissioner either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of such department, agency, or branch of Government, or a Juror * * *. 18 U.S.C. §201(a).

That Congress chose to include members within the broad sweep of §201 is singularly unimpressive, in view of its

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[93] The Government argues that §201 is not void for vagueness under due process standards but concedes that if the statutory provisions are overbroad in a First Amendment sense "then we can conceive of no statute directed at punishing a member of Congress for taking a bribe that would be constitutionally valid" (Govt. Br. 31).

concurrent intention to also extend coverage to millions of government officers and employees, from the President on down, plus all private citizens who serve on federal juries or have had occasion to act "for or on behalf" of the United States.[94] The identification of Congressmen in a criminal statute as "public officials", along with the rest of the general population, hardly establishes §201 as a "narrowly drawn statute", although the Government argues to the contrary (Govt. Br. 29-30).

Nor does it necessarily follow that Congress intended by definitional inclusion that its members be subjected to prosecution under each of the 11 paragraphs of §201, especially in the teeth of a claim under the Speech or Debate Clause. The "public official" definition makes sense in several areas where no questions arise under the Clause. For example, subsection (b) makes it a federal crime to bribe a "public official". Subsection (f) is to like effect. Read in the context of these provisions, it would not be objectionable for a Congressman to be classified as a "public official" because his legislative immunity would not shield the bribe-giver.

It is only when an attempt is made to read the definition of subsection (a) into the substantive provisions of subsections (c) or (g) that grave constitutional problems are encountered. The indictment against appellee is such an attempt, for which there is absolutely no precedent. It is founded upon the supposition that members of Congress are "public officials" within the intendment of subsections (c)(1) and (g). This construction depends upon an indis-

[94] See, e.g., *Parks v. United States*, 355 F. 2d 167 (5th Cir. 1965) (Air Force sergeant); *Harlow v. United States*, 301 F. 2d 361 (5th Cir.), cert. denied 371 U.S. 814 (1962) (civilian post exchange employee); *Fulks v. United States*, 283 F. 2d 259 (9th Cir. 1960), cert. denied 365 U.S. 812 (1961) (warehouseman); *Kemmler v. United States*, 133 F. 2d 235 (1st Cir. 1942) (physician).

criminate application of the subsection (a) definition and might well be avoided, so as to eliminate the obvious conflict between §201 and the Speech or Debate Clause. "A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score." *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916). Moreover, it is an ordinary principle of statutory construction that if there are two possible interpretations of a statute, one of which would raise a question of constitutionality, and another which would not, then the construction which fairly avoids the constitutional question must be adopted. *International Association of Machinists v. Street*, 367 U.S. 740, 749 (1961); *Crowell v. Benson*, 285 U.S. 22, 62 (1932). A reading of §201 which would disengage the "Member of Congress" definition from subsections (c) and (g), while relating it to the remaining provisions, would save the statute while honoring the Speech or Debate Clause.

However, if §201 is construed to permit prosecution of Members of Congress under subsections (c) and (g), then a collision with the Speech or Debate Clause would be clear and inevitable. Subsection (c)(1) creates an offense for any "public official" who "directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or for any other person or entity, in return for (1) being influenced in the performance of any official act * * *." Subsection (g) also speaks in terms of a "public official" who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him * * *." The term "official act", as used in both subsections, is defined in subsection (a) to include "any decision or action on any question, matter, cause,

suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit."

This, it is argued, constitutes the "narrowly drawn statute" which warrants a departure from *Johnson*. We think not. A law review note, commenting upon the "sweeping terms" of these same statutory provisions, concluded: "The language [of §201] would seem to be as broad as the scope given to the Speech or Debate Clause." Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 341 n.42 (1965). To so construe it would render §201 plainly unconstitutional.

The significance of the foregoing observation appears in the fact that pages 347-348 of the same Yale Law Review note were cited in *Johnson* as the sole source of the "narrowly drawn statute" proposition. 383 U.S. at 185 n.15. When the Court mentioned this possibility, it evidently had the following passage in mind:

> Admittedly, the difficulty of defining bribery in the legislative context is greater than in the area of executive conflict of interest. The indispensability of campaign funds and the pressures of constituents combine to blur the boundary between legitimate and illegitimate action. However, the definition of the offense of bribery *need not* rest upon vague evidentiary foundations. A precise definition of bribery *could* require proof of a concrete and complete transaction. Conviction of the offense *could* be predicated upon proof of the passage of consideration and the performance of a service in addition to an agreement binding the bribee to act. The *possibility* of a tight definition of bribery *which would sharply reduce discretion afforded under existing statutes* indicates that there need not be an absolute immunity to bribery prosecutions.

Note, *supra* at 347-348 (italics added).

It is evident that the author had in mind an ideal to be pursued, not a goal already attained. All "existing statutes", obviously including §201, were conspicuously placed in the unacceptable category. Without pausing to contest the author's notion that Congress can impair the constitutional privilege by tight definitions of bribery, we reject as unfounded any suggestion that §201 is defined with such precision as to qualify as a "narrowly drawn statute". For example, the Note condemned its companion, 18 U.S.C. §203, punishing conflicts of interest, as constitutionally vague for reasons equally applicable to §201.

> [It] allows conviction for an agreement to receive compensation even when the bribed service has not been performed and even when consideration has not passed. Thus the statute leaves the jury free to convict essentially upon evidence of intent only. Standards for proof of intent are rather uncertain, and a Congressman might fear legitimately that honest conduct could be misinterpreted. Every conversation with a constituent interested in having his Congressman support legislation or urge change in executive policy could be suspect. *Id.* 347.

Turning to §201 itself, the Note declared that its provisions "present vagueness problems similar to those encountered under the conflict of interest provision." *Id.* 347 n. 76.

It is obvious that neither the Note nor *Johnson* contemplated §201 as a "narrowly drawn statute". Congress may have been invited to enact new legislation containing a "tight definition of bribery" so as to overcome vagueness problems depicted in the Note. Assuming that Congress may constitutionally do so, it has not yet responded to the invitation and §201 still remains a wide-ranging "general

criminal statute." *United States v. Johnson*, 383 U.S. 169, 185 (1966).

Historically, the federal bribery statute has been construed "in the broadest possible manner." *United States v. Glazer*, 129 F. Supp. 285, 286 (D. Del. 1955). See also *United States v. Birdsall*, 233 U.S. 223, 230-231 (1914); *Parks v. United States*, 355 F. 2d 167, 168 (5th Cir. 1965); *United States v. Raff*, 161 F. Supp. 276, 279 (M.D. Pa. 1958). According to the courts, legislation of this type is the very antithesis of a "narrowly drawn statute":

> If this statute be viewed solely from the standpoint of grammar and phraseology, it is quite striking how many broadening words are used in the statute: "in *any* official capacity," "*any* department or agency," "on *any* question, matter, cause, or proceeding", which *may at any time* be pending, "which *may* by law be brought before him." Consider the number of disjunctive or alternative persons, actions, or situations referred to: "an officer *or* employee of, *or* person acting for *or* on behalf of the United States", "any department *or* agency", "decision *or* action", "any question, department *or* agency", "decision *or* action", "any question, matter, cause, *or* proceeding which may at any time be pending, *or* which may by law be brought before him", "in his official capacity, *or* in his place of trust *or* profit". There is no verbal requirement that the matter be pending before the official at the time of the bribe. It is sufficient if it "may *at any time* be pending", or if it "*may* by law be brought before him" at some time in the future.
>
> Certainly, in the face of such sweeping language and the purpose it was designed to accomplish, we find no reason to find any intent on the part of Congress that the statute must be narrowly construed, to exclude any person or any conduct fairly within the broad statutory ambit. To this statute (and its companion, 18 U.S.C.A. §201), the federal courts have properly given an extremely liberal interpretation.

Wilson v. United States, 230 F. 2d 521, 524 (4th Cir.), cert. denied 351 U.S. 931 (1956) (italics in original).

When §201 was enacted in its present form as part of the 1962 revision, it did not restrict the broad sweep of these interpretations:

> "The bill does not limit in any way the broad interpretation that the courts have given to the bribery statutes; rather, the intent is to insure that this broad interpretation shall be given universal application." House Rep. 748, Comm. on the Judiciary, 87th Cong., 1st Sess. 17 (1961).

A reading of §201, its definitions and substantive language, and its interpretation by the federal courts negates any supposition that it can be viewed as "narrowly drawn" under any reasonable definition. If anything, its terminology is more sweeping than the provisions of 18 U.S.C. §371, the "general criminal statute" held ineffective to support proceedings against Congressman Johnson. Nor can we believe that Congress meant by enacting §201 to restrict the freedom of Congressmen acting within their traditional sphere of legislative activity. Cf., *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951). Reliance by the Government upon a general criminal statute so lacking in specificity and so susceptible of unconstitutional application, with a consequent chilling effect upon legislative conduct, underlines the insubstantiality of this appeal.

2. It is interesting that the Government should draw an analogy between the federal bribery statute, 18 U.S.C. §201, and legislation providing for trial of witnesses who behave contumaciously before a congressional investigatory committee. Because Congress has inherent power to punish a nonmember for contempt, in order to protect its institutional integrity, the Government asserts that Congress, of the power to discipline its members (Govt. Br. 25-26).

To equate judicial proceedings for contemptuous behavior against witnesses with judicial proceedings against Congressmen is to miscomprehend completely the Speech or Debate Clause. The fallacy in the argument is so apparent as to warrant no further discussion. But what is especially noteworthy is that Congress, in providing an alternative method of exercising its own power to punish for contempt, has enacted legislation which — in stark contrast to 18 U.S.C. §201 — exemplifies what indeed might be regarded as a "narrowly drawn statute."

In 1857, Congress enacted a statute, one section of which declared it to be a misdemeanor, punishable by fine and imprisonment, for a witness summoned by either House or any committee to refuse to answer questions upon any matter under inquiry. Act of January 24, 1857, c. 19, §1, 11 Stat. 155, now codified as 2 U.S.C. §192. Another section of the same statute,[95] now codified as 2 U.S.C. §194, states the manner in which the courts acquire jurisdiction over the contemnor. In its present form it provides as follows:

> Whenever a witness summoned as mentioned in Section 192 fails to appear to testify or fails to produce any books, papers, records, or documents, as required, or whenever any witness so summoned refuses to answer any question * * * and the fact of such failure is reported to either House while Congress is in session, * * * it shall be the duty of the said President of the Senate or the Speaker of the House, as the case may be, to certify, and he shall so certify, the statement of facts aforesaid under the seal of the Senate or House, as the case may be to the appropriate United States attorney, whose duty it shall be to bring the matter before the grand jury for its action.

The provisions of §194 leave absolutely no doubt that a witness cannot be exposed to judicial proceedings without

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[95] Act of January 24, 1857, c. 19, §3, 11 Stat. 155.

affirmative action — report and certificate — by the aggrieved House. *In re Chapman*, 166 U.S. 661, 667 (1897). Unlike the federal bribery statute, it does not entrust matters to the unbridled discretion of the executive or to the suspicions of a grand jury. The latter is denied all authority to inquire into contempts before either House of Congress unless and until the House of Congress itself has acted.[96] Practice under §194 has demonstrated "beyond any doubt that the House and the Senate have consistently considered, and occasionally debated at length, resolutions authorizing the Speaker of the House or the President pro tempore of the Senate to certify under the statute. Votes have often been cast against such resolutions." *Wilson v. United States*, 369 F. 2d 198, 201 (D.C. Cir. 1966).[97]

As the *Wilson* case makes clear, the federal courts will not entertain a citation under §194 where it is obvious that the certifying House has not considered the citation on its merits. In *Wilson* the action of the Speaker of the House was held invalid and a conviction was reversed because the Speaker failed to make appropriate inquiry of the House before certifying to the United States attorney. The court held that the Speaker was not under a "mandatory" duty to certify until the House involved had considered *on the merits* a report of the committee before which the witness had appeared. A thorough review of legislative history disclosed a desire on the part of each House to monitor contempt citations as a "check on hasty action"

[96] *Ex parte Frankfeld*, 32 F. Supp. 915, 916-917 (D.D.C. 1940). Section 194 "requires a certification of the facts to the appropriate United States Attorney who is charged with bringing the matter before the grand jury," thereby signifying "that the Senate has elected to have the contempt punished as a misdemeanor." *United States v. Costello*, 198 F. 2d 200, 205 (2d Cir.), cert. denied 344 U.S. 874 (1952).

[97] For example of such a debate prior to a certifying resolution, see *United States v. Rumely*, 345 U.S. 41, 47-48 (1953).

and to promote "reflection within the legislative branch" upon matters certified. *Id.* 203.

In short, §194 embodies a deliberative concept which is utterly lacking here:

> [P]rosecution would not be begun without the additional scrutiny within the legislative branch, a scrutiny that would at least embrace examining the sufficiency of the statement of facts of alleged contempts, and consideration whether the incident constitutes the kind of wilful contumacy contemplated by the statute, or perhaps whether the matter is sufficiently dubious so that no contempt action should be begun in the absence of approval by the entire House. *Id.* 204.[98]

Rather than being a "check on hasty action", the federal bribery statute is now being treated by the Government as a blank check — for the executive to initiate prosecution, for the grand jury to inquire into, and for the trial jury to pass judgment upon the legislative acts and motivations of a United States Senator. The Senate itself has been excluded from all deliberations. We refuse to indulge in the belief that the Houses of Congress, by joining in the enactment of the federal bribery statute, intended to abdicate their historic trust under the Speech or Debate Clause.

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[98] In *Kinoy v. District of Columbia*, 400 F. 2d 761 (D.C. Cir. 1968), the Government initiated a prosecution for misbehavior before a House subcommittee without first obtaining the mandate of the House. Reversing the conviction, the Court of Appeals observed: "Where a participant in a legislative hearing behaves in such a manner as to raise a question as to the propriety of his behavior, the *initial* determination that criminal proceedings should be instituted against that party ordinarily lies with the body before which he is appearing, not an independent tribunal." *Id.* 764 (court's italics). *Wilson* was cited. *Id.* 400 F. 2d at 765 n.6.

CONCLUSION

For the foregoing reasons, we respectfully submit that the appeal should be dismissed for want of jurisdiction or, in the alternative, that the judgment of the District Court be affirmed.

Respectfully submitted,

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OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

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I. APPEALABILITY

The basis for our position that the order dismissing the indictment in this case is directly appealable to this Court (under 18 U.S.C. 3731 (Supp. V) as it read prior to the 1970 amendment) is set forth in our opening brief at pp. 5–10. Nothing appellee has argued, in our judgment, weakens that position. At its core all that his argument has shown is that the unamended statute is lacking in clarity, has engendered confusion in application and lends itself to nice technical arguments. See *United States v. Sisson*, 399 U.S. 267, 307–308. His claims do not, however, detract from the fact that the order here is appealable under either

445-360—71——1

the "invalidity * * * of the statute" or "motion in bar" provisions of the Act.

As we see it, a basic flaw in appellee's position lies in his effort to interweave substance with procedure. We, of course, do not dispute the central importance of the congressional privilege; we do not see, however, why that importance bars an appeal in the present context. The district court did not enter a summary judgment in favor of appellee (see Appellee's Brief, pp. 9–15). It specifically made clear it was dismissing the indictment (App. 33). Under the "invalidity * * * of the statute" branch of our argument, we perceive no difference between the dismissal here and, for example, a case in which the dismissal had been based on the ground of a First or Fifth Amendment claim. The effect of the ruling is that as to a certain class of cases—here a Congressman charged with receiving bribes where the bribe-taking had a relationship to legislative conduct—the bribery statute cannot validly be applied. Appellee, in short, has failed to take this case outside the reach of *United States* v. *Knox*, 396 U.S. 77, 79 n. 2, discussed in our main brief at pp. 5–8.

Equally unpersuasive is appellee's contention that jurisdiction does not lie under the "motion in bar" clause—the alternative branch of our jurisdictional claim—because he had not confessed to the commission of any crime (Appellee's Brief, p. 19). The ruling in *United States* v. *Weller*, 401 U.S. 254, does not aid appellee here. In that case the defendant had simply argued that he committed no crime based on facts appearing on the face of the administrative record (401

U.S. at 260–261). Here, however, the defense is one of immunity—in appellee's words that he "is charged with no act which may constitutionally be made a crime even if such act occurred" (Appellee's Brief, p. 19). As *Weller* makes clear, such a claim of immunity, no matter how verbalized, is a claim of "confession and avoidance" and falls within the traditional meaning of "motion in bar."

II. THE SPEECH OR DEBATE CLAUSE

On the merits, the core dispute in this case concerns fundamental differences as to the exercise of the constitutional power of Congress. At its essence, appellee's position is that by the Speech or Debate Clause the Framers left the Congress with no prerogatives; that only the body in which a member sits can impose punishment upon him for any dereliction which, while not aimed at legislative speech or debate, may indirectly involve inquiry into legislative conduct. One purpose of the historical discussion in our opening brief was to show that in formulating the Speech or Debate Clause the Framers did not intend the adoption of such a rigid rule. The clause was not meant to have the consequence of rendering Congress impotent to exercise its legislative authority under Article I, Sections 1 and 8, to enact a statute authorizing a judicial trial of a member who accepts a bribe. We add only a few comments to our original argument on this point.

1. The immunity provided by the constitutional provision is not for the purpose of protecting the individual legislator but to protect the legislative proc-

ess itself; the aim is to assure that legislators "are free to represent the interests of their constituents without fear that they will later be called to task in the courts for that representation" *Powell* v. *McCormack*, 395 U.S. 486, 503. The Speech or Debate Clause confers no immunity if Congress itself chooses to punish a bribe-taking member even where the bribe is related to his legislative conduct. However far Congress may go in this regard by direct disciplinary action,[1] we do not suggest that it may grant any broader power to the courts for this would squarely undercut the important values the Speech or Debate Clause was meant to protect. Undoubtedly, Congress cannot make legislative speech or conduct a crime subject to judicial trial and punishment. Such a statute would be wholly at odds with the privilege. But that is not what we are urging. Our position is that the Speech or Debate Clause does not carry any further; it does not prohibit Congress from passing a narrowly drawn statute punishing the receipt of a bribe. It is one thing to hold that free and uninhibited legislative action is such an important right that, in order to protect it from erosion, protection must be given to any legislative speech or debate no matter how unworthy its purpose. See *Tenney* v.

[1] Of course, there may be restraints on institutional congressional action stemming from other constitutional protections such as the First Amendment. See *Bond* v. *Floyd*, 385 U.S. 116, 132–137; cf. *Powell* v. *McCormack*, *supra*, 395 U.S. 486, 548: "Unquestionably, Congress has an interest in preserving its institutional integrity, but in most cases that interest can be sufficiently safeguarded by the exercise of its power to punish its members for disorderly behavior and, in extreme cases, to expel a member with the concurrence of two-thirds."

Brandhove, 341 U.S. 367, 377. It is quite a different thing to say that the clause was meant to immunize a Congressman for a corrupt agreement which would be a crime whether he engaged in legislative conduct or not. The historical analysis in our opening brief indicating that the Framers were fully aware of the need for the privilege and yet aware of legislative abuses, suggests that they intended to give Congress leeway in this limited fashion in determining how best to serve the aim of the legislative privilege and yet preserve the purity of the legislative process.

2. Appellee argues that prior to 1853 when Congress enacted the first statute making it a crime for members to accept bribes in return for the performance of legislative acts,[2] bribe-taking by a legislator was not an indictable offense (Appellee's Brief, pp. 36–37). Early Congresses did not regulate such conduct by statute, the argument runs, because of an awareness that they were powerless to do so by virtue of restrictions inherent in the privilege of freedom of speech and debate. There is, however, a less conjectural explanation to be found in the practice of the English Parliament and the extent to which the colonial legislatures and the early Congresses were, quite naturally, influenced by that practice. In this respect, the significant difference in the posture of the English Parliament vis-à-vis Congress indicates that while the antecedents of the Speech or Debate Clause are to be found in parliamentary experience, parliamentary practices are by no means a reliable measure of what constitutes appro-

[2] Act of February 26, 1853, c. 81, 10 Stat. 170, 171.

priate congressional action in the realm of legislative privilege. We have discussed the *lex parliamenti* in our opening brief. Our purpose was to show that this principle was broader than the freedom of speech or debate and was not carried over to this country (see Govt's Br., pp. 15–16, n. 12). Parliament's exclusive regulation of the conduct of its members thus stems from a broad exercise of power rejected by this country (see *Watkins* v. *United States*, 354 U.S. 178), and not from the Speech or Debate Clause. The fact that Parliament has not made bribe-taking in return for the performance of legislative acts a statutory offense[3] is no justification for concluding that Congress lacks the power to do so. Accordingly, while the Speech or Debate Clause prohibits the courts—and Congress may not direct to the contrary—from ques-

[3] Certain offenses, regarded by Parliament as a breach of privilege and, thus, contempt of its authority, are also offenses at law. If for some reason Parliament prefers that the offense be handled by the ordinary tribunals, it will direct the Attorney General to prosecute the offender. May, *The Law, Privileges, Proceedings and Usage of Parliament*, 103 (Fourteenth ed., Campion 1946). Thus, while Parliament may choose to exclude the jurisdiction of the courts, it may exercise the prerogative of invoking that jurisdiction when desirable. See also *Myddleton* v. *Wynn*, 125 Eng. Rep. 1339, 1344 (Ex. Ch., 1745), in which the court rejected the argument that a statute vesting jurisdiction in the courts with respect to certain matters governing the election of members of Parliament was invalid because Commons possessed the sole authority to judge of the elections of its members. In rejecting this claim, the court noted, "it is certain that an Act of Parliament may give the Courts at Westminster a jurisdiction in cases of this nature, though they had none at common law, because the House of Commons is *party to every Act and therefore bound by it*" (emphasis added).

tioning legislative speech or debate, it does not prevent Congress from enacting a statute providing for the punishment of its members who solicit or accept a bribe even though this may tangentially entail some inquiry into legislative acts or motives.

3. In what it has deemed to be a necessary and proper exercise of its constitutional authority, Congress has since 1853 enacted statutes which prohibit the taking of bribes by Congressmen in return for their influence with respect to legislative acts. A statute such as 18 U.S.C. 201 prescribing a specified standard of conduct and specifically applying that standard to congressmen reflects the exercise of congressional discretion in an area of determination reserved to it by the Constitution. Congressional enactment of such a statute does no violence to the Speech or Debate Clause since it punishes the solicitation or acceptance of a bribe, not legislative speech or debate. It is thus a logical and proper exercise of the authority which the Speech or Debate Clause did not intend to remove. A Senator or Representative enjoys no immunity from prosecution under 18 U.S.C. 201 not because the statute purports to deprive him of that immunity, but because the Speech or Debate Clause confers no immunity when Congress acts to regulate the conduct of its members for accepting bribes.[4]

It is this considered judgment to enact a statute setting forth a judicial procedure for the punishment of corrupt members which underlines the difference

[4] The statutory language thus focuses on and proscribes the bribe-taking not legislative speech or debate (see pp. 2–3 of our opening brief).

between this case and *Johnson*, which involved prosecution under a statute of general applicability.[5] The Speech or Debate Clause makes clear that Congress in the first instance has the power to punish its members for misconduct; the Clause further protects against any watering down of its protections by a catch-all criminal statute. On the other hand, the Clause should not be read as inharmonious with Congress' power under Article I, Sections 1 and 8. In short, it does not prohibit Congress from defining certain conduct and providing sanctions—as it has done in 18 U.S.C. 201—which involves the solicitation or receipt of a bribe and to provide that these matters should be tried by the courts. Such a statute does not focus on legislative conduct but on the non-legislative act of soliciting or accepting money improperly. Thus, appellee's assertion (Appellee's Brief, pp. 27–29) that there is no difference between this case and *Johnson* misses the point of our argument. The difference is critical since the prosecution in *Johnson* reflected an act of executive initiative which necessarily follows from a statute of general applicability; the prosecution here, on the

[5] It should be noted that three members of this Court in *Johnson* concurred in what they deemed to be the "limited holding" in that case—namely "that the use of the Congressman's speech during this particular trial—with an examination into its authorship, motivation and content—was violative of the Speech or Debate Clause." *United States* v. *Johnson*, 383 U.S. 169, 186 (concurring opinion of Mr. Chief Justice Warren, joined by Justices Douglas and Brennan). At the very least, this suggests that the concurring Justices may have entertained a different view if the inquiry into legislative action was marginal, even under a general criminal statute.

other hand, stemmed from Congress' expression of intent as to how it wished the charge of bribe-taking by members to be handled.[6]

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and the cause remanded with directions to reinstate the dismissed counts of the indictment.

Respectfully submitted.

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SEPTEMBER 1971.

[6] The argument that the statute is not "narrowly drawn" (Appellee's Brief, pp. 72–84) is answered in our opening brief and no further elaboration is necessary. We note only that because Congress enacted a different type of statute as to non-members who act contumaciously before it proves only that it was dealing with a different subject matter which, by its inherent nature, is subject to a more precise definition.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-45

UNITED STATES OF AMERICA,

Appellant,

v.

DANIEL B. BREWSTER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEE ON REARGUMENT

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March, 1972

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Table of Contents

	PAGE
ARGUMENT	2
I. Jurisdiction	2
II. The Speech or Debate Clause	13
A. Oral Argument	13
B. The Senator Gravel Case	23
C. The Senator Hartke Case	28
CONCLUSION	29
ADDENDUM	31

Table of Citations

Cases

Barry v. United States ex rel. Cunningham, 279 U.S. 597 (1929) 29

Best v. District of Columbia, 291 U.S. 441 (1934) 12

Doe v. McMillan, 40 L.W. 2471 (D.C. Cir. 1972) 28

Dombrowski v. Burbank, 358 F. 2d 821 (D. C. Cir. 1966), aff'd 387 U.S. 82 (1967) 12-13, 20, 22

Dombrowski v. Eastland, 387 U.S. 82 (1967) 11

Gravel v. United States, 40 U.S.L.W. 3398 (1972) 23

Kilbourn v. Thompson, 103 U.S. 168 (1881) 19, 20, 22, 25

New York Times Co. v. United States, 403 U.S. 713 (1971) 23

New York Times Co. v. United States, 91 S. Ct. 2270 (1971) 23

Powell v. McCormack, 395 U.S. 486 (1969) 4, 11, 21-22

Reed v. County Commissioners of Delaware County, Pennsylvania, 277 U.S. 376 (1928) 28-29

Roudebush v. Hartke, 40 U.S.L.W. 4171 (1972) 28-29

Tenney v. Brandhove, 341 U.S. 367 (1951) 11, 19, 20, 21, 22

United States v. Apex Distributing Co., 270 F. 2d 747 (9th Cir. 1959) 4

United States v. Borden Co., 308 U.S. 188 (1939) 16

United States v. Brewster, 401 U.S. 935 (1971) 2

United States v. Brewster, 40 U.S.L.W. 3351 (1972) 2

PAGE

United States v. Dietrich, 126 Fed. 676 (D. Neb. 1904) 12

United States v. Doe, 332 F. Supp. 930 (D. Mass. 1971), modified and affirmed — F. 2d — (1st Cir.), cert. granted sub nom. Gravel v. United States, 40 U.S.L.W. 3398 (1972) 23-28

United States v. Findley, 439 F. 2d 970 (1st Cir. 1971) 4, 12

United States v. Johnson, 383 U.S. 169 (1966) 3, 4, 9-10, 11, 13, 15-16, 19-20, 21, 22, 25

United States v. Johnson, 419 F. 2d 56 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970) 10

United States v. Jones, 345 U.S. 377 (1953) 16

United States v. Keitel, 211 U.S. 370 (1908) 17

United States v. Marion, 92 S. Ct. 455 (1971) 3

United States v. Mescall, 215 U.S. 26 (1909) 17

United States v. Ponto, 40 L.W. 2469 (7th Cir. 1971) 4, 12-13

United States v. Sisson, 399 U.S. 267 (1970) 4

Constitutions, Statutes, Rules

United States Constitution:

Article I—

Section 5, cl. 1 28

Section 5, cl. 2 17

Section 6, cl. 1 *passim*

18 U.S.C. §201 1, 2, 3, 13, 18

§641 24

§793 24

§3731 1, 2, 3, 4

39 U.S.C. §4001 et seq. 8

Rule 12(b)(1), Federal Rules of Criminal Procedure 4

Miscellaneous

Note, *Mandamus to Review Judgments of Acquittal in Federal Courts*, 71 YALE L.J. 171 (1961) 12

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SUPPLEMENTAL BRIEF FOR APPELLEE ON REARGUMENT

This is a direct appeal by the United States from a judgment of the United States District Court for the District of Columbia, dismissing five counts of an indictment charging the Appellee, a former United States Senator, with the solicitation and acceptance of bribes in violation of 18 U.S.C. §201. The judgment of the District Court was entered on November 3, 1970 (A. 34), for reasons stated in an unpublished oral opinion delivered on October 9, 1970 (A. 33). This appeal was noted on November 4, 1970 (A. 34-35), pursuant to the Criminal Appeals Act, 18 U.S.C. §3731. Appellee filed a motion to dismiss the appeal and, on March 1, 1971, this Court postponed further consideration of the

question of jurisdiction to the hearing on the merits (A. 35). *United States v. Brewster*, 401 U.S. 935 (1971). Following the submission of briefs, this Court heard oral argument on October 18, 1971, but afterwards ordered reargument. *United States v. Brewster*, 40 U.S.L.W. 3351 (1972).

This direct appeal presents two novel and important questions, formulated by Appellee as follows (App. Br. 2-3):

1. Whether the Criminal Appeals Act, 18 U.S.C. §3731 (as applicable prior to its recent amendment), confers jurisdiction upon this Court not only to review a decision sustaining an affirmative defense on the merits but also to pass upon the constitutional validity of the federal bribery statute, 18 U.S.C. §201, as to which the District Court expressed no opinion.

2. Whether the District Court properly sustained the Appellee's claim of legislative immunity under the Speech or Debate Clause from any prosecution arising out of his performance of legislative acts in the United States Senate.

We have fully discussed the issues in the Brief for Appellee earlier filed and it is our purpose in this Supplemental Brief to clarify matters which were subjects of inquiry during previous oral argument and to record our views concerning them. In no sense, however, does our treatment of this supplementary material supersede or alter the full treatment of issues contained in the Brief for Appellee. Most of those issues are beyond the scope of this Supplemental Brief and it remains necessary to consult the Brief for Appellee for a definitive statement of our position.

I. JURISDICTION

The District Court held, under the agreed facts of this case, that the Speech or Debate Clause of the Constitution

(Article I, §6), as interpreted by this Court in *United States v. Johnson*, 383 U.S. 169 (1966), provides a United States Senator with a constitutional shield against prosecution for alleged bribery in the performance of legislative acts (A. 33). In appealing the decision, the Government has attempted to invoke two provisions of the Criminal Appeals Act which authorize direct appeal to this Court:

> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy. * * * 18 U.S.C. §3731.

There are three distinct reasons why the Government's jurisdictional footing is misplaced. First, the decision below was not one "setting aside or dismissing" the indictment but amounted to a summary judgment on the merits, precluding appeal under any branch of the Criminal Appeals Act (App. Br. 9-15). Second, the decision below was not "based upon the invalidity or construction" of the federal bribery act, 18 U.S.C. §201 (App. Br. 15-17). Third, the decision below was not one sustaining a "motion in bar" (App. Br. 17-20). The second and third contentions have been fully detailed in our earlier brief and we believe they require no further discussion. For the most recent treatment of the "motion in bar" clause, see *United States v. Marion*, No. 70-19, this Term, 92 S. Ct. 455, 459 (1971), decided December 20, 1971.

It is the first contention to which we return. As explained in the Brief for Appellee, the "setting aside or dismissing" language of §3731 was meant to apply only to

dismissals based upon defects in the indictment or in the institution of the prosecution. Where dismissal is based not upon the sufficiency of the indictment alone, but also upon a stipulation of the parties, the effect is an acquittal on the merits not appealable anywhere under §3731. This is particularly true when matters of defense ordinarily triable with the general issue are singled out for pre-trial determination on the merits, as is permissible under Rule 12(b)(1) of the Federal Rules of Criminal Procedure. Since the policy of the Speech or Debate Clause favors resolution on the merits in advance of trial, to insure that "legislators are relieved of the burden of defending themselves", *Powell v. McCormack*, 395 U.S. 486, 505 and n. 25 (1969), we argued that it was entirely appropriate for the Government to proffer the facts and for the District Court to base its decision thereon. For these propositions, we placed primary reliance upon *United States v. Sisson*, 399 U.S. 267, 284-291, 301 (1970); *United States v. Johnson*, 383 U.S. 169, 172, 176, 185 (1966); *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971); *United States v. Apex Distributing Co.*, 270 F. 2d 747 (9th Cir. 1959). See App. Br. 9-15. In the same context, we also invite the Court's attention to *United States v. Ponto*, 40 L.W. 2469 (7th Cir. 1971) (en banc), decided December 28, 1971.

In dismissing the present indictment, the District Court prefaced its decision as follows:

> Gentlemen, *based on the facts of this case, it is admitted* by the Government *that the five counts* of the indictment which charge Senator Brewster *relate to* the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States. (A. 33) (Italics added).

On this appeal the Government has either ignored or sought to minimize the operative effect of the italicized

words. Its Jurisdictional Statement (at 2-3) was silent as to the factual underpinnings of the decision and its Brief (at 8) flatly denied that the District Court acted upon "any facts special to this case * * *." After the Appellee pointed out that pre-trial disclosures and concessions by the prosecution had enabled the District Court to dispose of the case without necessity of trial (App. Br. 10-11), the Government perceived nothing of the kind (Govt. Rep. Br. 2). During oral argument on October 18, 1971, the Solicitor General represented to this Court:

> In this case there was no stipulation of facts of any sort. There was nothing that could even be regarded as a bill of particulars or anything like that. There were no concessions by the Government of any sort, nor any factual assertions by the Government beyond what is stated in the indictment (Transcript 8).

Because of this inadvertent misstatement, and in order to acquaint this Court with the actual context of the decision below, counsel for Appellee made reference to a confidential memorandum submitted to the District Court (although not formally of record). This memorandum, we explained, outlined the Government's proof as it related to the Appellee's legislative activities (Transcript 23-26). Judging by inquiries from the Court, our reference to the memorandum has engendered some confusion as to its status of record. Clarification is not only desirable, but is indispensable to resolution of the jurisdictional issue.

The confidential memorandum in question is an 11-page document entitled Memorandum of Conferences and dated March 23, 1970. As its name implies, it was the product of conferences between attorneys for the Government and the defendants and was prepared in lieu of a formal bill of particulars, the filing of which would have occasioned

widespread newspaper publicity. By agreement of all counsel the Memorandum of Conferences was submitted *in camera* to the District Judge in July, 1970, months in advance of his ruling upon the Appellee's motion to dismiss. See Addendum hereto, *infra* at 31-32.

While the Memorandum of Conferences was not entered of record prior to dismissal, because of the inherent danger of premature disclosure to the press and public, it was properly considered by the District Judge and repeatedly incorporated by reference into other pre-trial memoranda which were indeed filed of record and which are thus readily available for this Court's inspection.[1] The Govern-

[1] As to memoranda filed on April 20, 1970, see Memorandum of Points and Authorities in Support of Defendant Daniel B. Brewster's Motion for Order to Produce Recorded Testimony of John L. Sullivan Before the Grand Jury (at 1-2); Memorandum of Points and Authorities in Support of Defendant Spiegel, Inc.'s Motion for Order To Produce Recorded Testimony of John L. Sullivan Before the Grand Jury and Statements By Sullivan Relating To the Subject Matter of the Indictment in this Case (at 1-2); Memorandum of Points and Authorities in Support of Defendant Spiegel, Inc.'s Motion for a Bill of Particulars (at 1); Memorandum in Support of Defendant Spiegel, Inc.'s Motion for Order to Produce Books, Papers, Documents, Tangible Objects (at 1-2).

As to Government memoranda filed on July 1, 1970, see Memorandum of Points and Authorities in Support of Government's Answer To Defendant Spiegel, Inc.'s Motion for Bill of Particulars (at 1); Memorandum of Points and Authorities in Support of the Answer of the United States of America To the Motion of Defendant Spiegel, Inc. for Order To Produce Books, Papers, Documents and Tangible Objects (at 1); Government's Answer To the Motion of Defendant Spiegel, Inc. To Dismiss the Indictment on Grounds of Vagueness, Failure To State an Offense, and Non-Applicability of Statute To Corporation (at 2).

As to memoranda filed on July 15, 1970, see Reply Memorandum of Defendant Spiegel, Inc., in Support of Its Motion for an Order To Produce Recorded Testimony of John L. Sullivan Before the Grand Jury and Statements By Sullivan Relating To the Subject Matter of the Indictment (at 1); Reply Memorandum in Support of Defendant Spiegel, Inc.'s Motion for a Bill of Particulars (at 3); Memorandum of Defendant Spiegel, Inc., in Reply To Motions of

ment is certainly not in a position to disavow the Memorandum of Conferences, having acknowledged "the generous discovery the Government has given to the defendants, as evidenced by the Memorandum of Conferences held between defense counsel and attorneys for the Government * * *."[2] The Government also informed the District Court, one week prior to dismissal of the indictment, that the case for the prosecution was outlined in the Memorandum of Conferences:

> In this case, the Government has already given a memorandum [i.e., Memorandum of Conferences] to defendant Brewster *setting forth what it expects to prove at trial. This memorandum will be part of the record in this case.*[3]

Sullivan and the United States in Opposition To the Motion of Defendant Spiegel, Inc., for Production of Items Subpoenaed (at 9).

As to memoranda filed on July 31, 1970, see Memorandum of Points and Authorities in Support of Defendant Daniel B. Brewster's Motion for a Bill of Particulars (at 5).

As to Government memoranda filed on October 1, 1970, see Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss the Indictment on Grounds That It Improperly Charges the Defendant as Both a Principal and an Aider and Abettor, That Counts 1, 3, 5, and 7 Are Unconstitutionally Vague, and That the Bribery Statutes Themselves Are Unconstitutionally Vague (at 3).

[2] Memorandum of Points and Authorities in Support of Government's Answer To Defendant Spiegel, Inc.'s Motion for Bill of Particulars (at 1), filed July 1, 1970. In another memorandum, Government counsel wrote: "The Government has attempted to keep disputes over discovery to a minimum by agreeing to confer with defense counsel informally. These conferences have taken place and, as the memorandum of those conferences indicates, the Government has not been tight-fisted in its attitude toward discovery." Memorandum of Points and Authorities in Support of the Answer of the United States Of America To the Motion of Defendant Spiegel, Inc. for Order To Produce Books, Papers, Documents and Tangible Objects (at 1), filed July 1, 1970. Although the foregoing memorandum was addressed to motions filed on behalf of Spiegel, Inc., a co-defendant, the Government treated its memoranda as a sufficient response to identical later-filed motions on behalf of Appellee.

[3] Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss the Indictment on Grounds That It Improperly

Nor did the Memorandum of Conferences serve as the exclusive medium of factual disclosure by the Government. In addition, in a letter to the District Judge dated September 30, 1970, Government counsel reiterated that its case hinged upon a showing that the Appellee's votes had been influenced by alleged bribes:

> The Government will contend that all of Brewster's votes in the Senate and in Committee with regard to the postage rate provisions of H.R. 7977 were influenced by the Spiegel payments set forth in the indictment.

On October 1, 1970, eight days before the indictment was dismissed, this letter was filed in the District Court and its contents are a matter of record on this appeal. And it is also a matter of record that H.R. 7977 — the legislation considered and voted upon by Appellee — was ratified by the Senate and enacted into law. See Postal Revenue and Federal Salary Act of 1967, Pub. L. 90-206, 81 Stat. 615, 621, codified at 39 U.S.C. §4001 et seq.

In clarifying the state of the record, we have purposely refrained from divulging the contents of the Memorandum of Conferences. What this Court must recognize is that the decision below was not rendered in an evidentiary vacuum, as the Government presently contends. Neither the parties nor the District Court limited their inquiries to the four corners of the indictment, but agreed that it was necessary to the pre-trial resolution of the constitutional question for the District Court to review the broad outlines of the case to be presented at trial. Argument on the motion to dismiss was premised upon elimination

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Charges, the Defendant as Both a Principal and an Aider and Abettor, That Counts 1, 3, 5, and 7 Are Unconstitutionally Vague, and That the Bribery Statutes Themselves Are Unconstitutionally Vague (at 3), filed October 1, 1970. (Italics added.)

of any controversy over the relationship between the formal charges and the anticipated factual showing as to legislative duties performed by appellee in the Senate. During hearing on the motion the parties expressly disclaimed any dispute on this crucial point. Counsel for Appellee stated (A. 12-13):

> Now, in this regard the papers which have been filed in the case *and the data which has been supplied as respects the claims made against the Defendant Brewster* make it perfectly clear that what is being attacked by this indictment are Senator Brewster's votes in committee and his votes on the floor and his activities in connection with what the Supreme Court has described as things generally done in a session of the House by its members. (Italics added).

Government counsel was in complete agreement. When asked whether the Senator was charged with "anything not related to his purely legislative functions", he replied (A. 28):

> We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that.

Absent clear agreement as to the facts, the question could not have been squarely presented. The Speech or Debate Clause is not an automatic, self-executing prohibition against the indictment of Congressmen. It does not shield conduct "that is in no wise related to the due functioning of the legislative process". *United States v. Johnson*, 383 U.S. 169, 172 (1966). Conversely, a prosecution may not attempt to "draw into question the legislative acts of the defendant member or his motives in performing them". *Id*, 185. Between these extremes lie abundant shades of

gray. As *Johnson* holds, a prosecution of a Congressman may run its normal course, if it can be "wholly purged of elements offensive to the Speech or Debate Clause." *Id.*, 185.[4]

In the proceedings below, the Government consistently and forthrightly took the position that its case depended upon scrutiny of the Appellee's legislative acts as a Senator and his motives in performing them. This admission was supported by the factual disclosures volunteered to Court and counsel. Conceding that the Appellee's conduct fell within the protective scope of the Speech or Debate Clause, the Government argued that such protection was not absolute. According to its theory, Congress was not prohibited by the Clause from reaching such conduct by enacting a narrowly-drawn criminal statute delegating authority to the Courts to question the legislative activities of Congressmen.[5] In other words, the Government contended for a statutory exception to the constitutional prohibition otherwise applicable to this case.

The District Court was initially confronted with three possible alternatives. First was the question whether the prosecution's case depended upon proof of legislative acts and motives in relation to the alleged bribes. On this question the Government disclaimed any controversy. The two remaining options reflected the legal contentions of the parties as to the scope of protection afforded under

[4] The case was remanded for a new trial. *United States v. Johnson*, 383 U.S. 169, 180 (1966). On remand, the speech-oriented court was dismissed without Government opposition but Johnson was reconvicted "on the remaining substantive counts which had nothing to do with his speech". *United States v. Johnson*, 419 F. 2d 56, 58 (4th Cir. 1969), cert. denied 397 U.S. 1010 (1970).

[5] Government's Answer To the Motion of Defendant Daniel B. Brewster To Dismiss Counts 1, 3, 5, 7, and 9 of the Indictment as Violative of Article I, Section 6, of the United States Constitution, filed October 1, 1970.

the Speech or Debate Clause, as construed by *United States v. Johnson*, 383 U.S. 169 (1966). If the Clause afforded absolute protection, as appellee contended, then the prosecution must fall irrespective of the statutory underpinnings of the indictment. If not, then the next logical step would have been to consider the Government's contention that the protection afforded by the Clause yields to the asserted power of Congress to delegate punishment of its members under a "narrowly drawn statute".

The District Court did not reach the Government's contention because it held "that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from *any* prosecution for alleged bribery to perform a legislative act" (A. 33) (italics added). We submit that this decision, although couched in terms of dismissal, operated as an acquittal on facts disclosed to the District Court. In this determination the wording of the indictment and the language of the statute were of scant importance. Under the District Court's view of the Clause, if the case had proceeded to trial under *any* indictment, however worded, the same admitted facts would have compelled an acquittal from which no appeal would lie. By its pre-trial review of the facts the District Court found that the case tendered by the Government could not proceed "wholly purged of elements offensive to the Speech or Debate Clause". *United States v. Johnson*, 383 U.S. 169, 185 (1966).

The Speech or Debate Clause "not only provides a defense on the merits but also protects a legislator from the burden of defending himself". *Powell v. McCormack*, 395 U.S. 486, 501-503 (1969). See *Dombrowski v. Eastland*, 387 U.S. 82, 85 (1967); *Tenney v. Brandhove*, 341 U.S. 367, 377

(1951). If a legislator must stand trial and have his legislative conduct evaluated by a jury before he can obtain acquittal, the policy of the Clause is subverted. It was the constitutional duty of the District Court, with the cooperation of the Government, to review the factual outlines of the prosecution in advance of trial and to discharge the Appellee when it appeared that the facts could not serve as the foundation for prosecution. As Judge (later Justice) Van DeVanter once observed, "it would be a waste of time to listen to evidence of other matters when at the outset a fact is clearly and deliberately admitted which must defeat the prosecution in the end". *United States v. Dietrich*, 126 Fed. 676, 678 (D. Neb. 1904). If a concession would justify an acquittal, a dismissal based upon such a concession should also terminate the prosecution and not serve as the springboard for a Government appeal. Surely, "there is little functional justification for reviewing a trial court's action in entering judgment as soon as it becomes apparent that the case must fail, since a judgment of acquittal at the close of the evidence would admittedly not be reviewable even where the trial court offered no reason for its action".[6]

Viewed in this perspective, the action of the District Court "was in reality an acquittal, or, more precisely, a summary judgment on the merits not appealable anywhere under Section 3731". *United States v. Findley*, 439 F. 2d 970 (1st Cir. 1971).[7] See *United States v. Ponto*, 40

[6] Note, *Mandamus To Review Judgments of Acquittal in Federal Courts*, 71 YALE L.J. 171, 173 (1961). "The power of the court to act upon facts conceded by counsel is as plain as its power to act upon facts produced." *Best v. District of Columbia*, 291 U.S. 411, 415 (1934). By analogy, there is no appeal when the Government's opening statement reveals that it has no case and the trial court terminates the prosecution.

[7] In a civil context, summary judgment granted to a Senator was sustained on appeal where, as here, the "record before the District

L.W. 2469 (7th Cir. 1971) (en banc), decided December 28, 1971.

II. THE SPEECH OR DEBATE CLAUSE

A. Oral Argument

The Government attempts to treat this case as one presenting a single issue: "Whether Congress may constitutionally enact a statute providing for judicial sanctions against a member who accepts a bribe for performance of a legislative act, without impinging upon the rights protected by the Speech or Debate Clause" (Juris. St. 5-6; Govt. Br. 12). The entire thrust of its argument, consistently advanced in this Court and during the proceedings below, was that the Clause confers no immunity if Congress itself chooses to specifically provide for judicial trial and punishment of a bribe-taking Member even where the bribe is related to his legislative conduct. Although it was contended that the federal bribery statute, 18 U.S.C. §201, tends to focus upon antecedent conduct in soliciting and accepting bribe payments, the necessary relationship between the bribe and the legislative conduct was never questioned; indeed, it was conceded by the Government.

On oral argument, however, the Solicitor General introduced a new element by asserting (Transcript at 11) that the trial could proceed under the subject indictment without offending the Speech or Debate Clause, as construed by *United States v. Johnson*, 383 U.S. 169 (1966). It was even suggested at one point that the Clause protects only speech or debate on the Senate floor but does not extend

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Court contained unchallenged facts of a nature and scope sufficient to give [him] an immunity against answerability in damages for actions taken in the course of [his] legislative activities". *Dombrowski v. Burbank*, 358 F. 2d 821, 824 (D.C. Cir. 1966), affirmed sub. nom. *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

to other legislative activity (Transcript at 16-17). Assuming a broader construction of the Clause, ran the argument, a conviction could be sustained under the indictment without any showing how the Appellee voted or, indeed, without any evidence that he voted at all (Transcript at 56).

This belated attempt to divorce the claimed acceptance of bribes from the performance of legislative duties prompted several members of the Court to pose a series of hypothetical questions. We were asked whether a Senator would be immune from prosecution

—if he never made a speech or cast a vote but accepted a bribe in return for his promise to perform such an act (Transcript at 29-33).

—if he never made a speech or cast a vote but accepted a bribe in return for his promise to abstain — i.e., not to vote or make a speech (Transcript at 33-35).

—if he accepted one bribe to vote *pro* and accepted another bribe to vote *con* and then took no action at all (Transcript at 35-36).

—if he did not accept a bribe but paid a bribe to another Senator to influence his legislative conduct (Transcript at 40-44).

—if he did not accept a bribe but assaulted another Senator who had interfered with the assailant's vote or had otherwise obstructed the performance of legislative duties (Transcript at 44-47).

—if he did not accept a bribe but assaulted or threatened another Senator in an attempt to influence the victim's vote or performance of other legislative duties (Transcript at 50-52).

We recognize that these extreme postulates represent an understandable and proper attempt by the Court to as-

certain the outer limits of the coverage under the Speech or Debate Clause. We believe that our responses in oral argument are supported by the historic constitutional policy of shielding legislators from executive or judicial inquiry into motives underlying their legislative conduct. Drawing precise lines is a hazardous if not impossible undertaking. The *Johnson* case is the first and only case to interpret the Clause in the context of a bribery prosecution. Although we are satisfied that *Johnson* is controlling under the admitted circumstances of this case, it does not dispose of the wide-ranging hypothetical situations depicted in oral argument.

Nor must they be resolved on this appeal. The indictment recites that Appellee, in his capacity as a Senator, served as a member of the Committee on Post Office and Civil Service. During the First Session of the Nineteenth Congress, that Committee considered legislation to adjust postal rates. The first, third, fifth, and seventh counts of the indictment charged Appellee with soliciting and accepting bribes "in return for being influenced in the performance of official acts in relation to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity and in his place of trust and profit" (A. 1-5). The ninth count charged him with accepting a bribe "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity and in his place of trust and profit" (A. 6). As previously discussed, the vague and ambivalent language of the indictment was narrowed by pre-trial disclosures removing all doubt that the Government intended to explore the legislative actions taken by Appellee during the indictment period in an attempt to establish a nexus between such actions and

the alleged bribe payments. In other words, the Appellee stood accused of "being influenced" improperly in all that he did or said with respect to specific postal rate legislation. "The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and as will appear that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry." *United States v. Johnson*, 383 U.S. 169 (1966).

The Government did not join issue below on this point. Its response in the District Court was one of confession and avoidance. It conceded that its case depended upon proof of legislative acts ("they are legislative acts — we are not going to quibble over that", A. 28) but argued that inquiry into motivation for such acts was nevertheless authorized by a "narrowly drawn" statutory exception to the Speech or Debate Clause. The Government framed the issue in terms of the power to connect the alleged payments with legislative duties actually performed by the Appellee.[8] And the District Court accepted the Government's invitation to so construe the indictment:

> Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster *relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.* (A. 33) (Italics added).

That construction of the indictment is binding upon this Court and is not reviewable at the instance of the Government. *United States v. Jones*, 345 U.S. 377, 378 (1953); *United States v. Borden Co.*, 308 U.S. 188, 193, 194 (1939).

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[8] Thus the Government acknowledged in its Brief (Govt. Br. 31 n. 34) that "the instant indictment alleges that both the bribe and the services were carried out".

Ignoring this principle on oral argument, the Government now contends for a limited reading of the indictment: it believes that a conviction could be sustained under the indictment without probing into the Appellee's legislative conduct, votes or motives (Transcript at 56). Such a contention is foreclosed, we submit, by what happened in the District Court. This is not a proper case for deciding in the abstract whether and under what range of circumstances a Senator can be prosecuted for bribery under a different indictment which involves no inquiry into his related votes and motives. The precise question here is whether a Senator can be prosecuted under an indictment which has been construed with binding effect by the District Court as calling into question the Appellee's motives, votes and other legislative conduct. The District Court decided this question in the negative and, on an appeal brought up under the Criminal Appeals Act, this Court's "inquiry is limited to the particular question decided by the court below". *United States v. Mescall*, 215 U.S. 26, 31 (1909). See *United States v. Keitel*, 211 U.S. 370, 398 (1903), and authorities discussed in Brief for Appellee, at 17 n. 9 and 26 n. 15.

Although the District Court construed the present indictment as necessitating inquiries which are offensive to the Speech or Debate Clause, we shall assume the contrary and proceed to consideration of the hypotheticals posed during oral argument. These may be reduced to a common denominator. In each instance a theoretical Senator has resorted to bribery, assault, threats or other reprehensible techniques to achieve a legislative result. Unquestionably, the Senate would have plenary jurisdiction to investigate and punish the offending member. Article I, Section 5, Clause 2 of the Constitution so provides. Without the intervention of the Speech or Debate Clause, it may be

assumed that the antecedent behavior would be amenable to ordinary prosecution under a criminal statute defining the offense.

We submit that the Speech or Debate Clause absolutely precludes prosecution of a Senator, if an element of the crime requires inquiry into what he says or does as a legislator. No evidence from any source of his legislative acts or motives may be used to convict him. For example, if a Senator sponsoring a bill were to threaten or assault an opponent of the measure in an attempt to coerce a change in attitude, the act could be prosecuted only to the extent that his purpose or motives are not called into question. This would be a mixed question of fact and statutory definition. And if threats were uttered or an assault committed during the heat of debate in a legislative session, it is arguable that the Clause would bar prosecution altogether even if the crime was not defined in terms of specific intent. Even Bernadette Devlin was not prosecuted by the Crown for her irate physical attack on the Home Secretary during a recent Session of Parliament, although newspaper accounts did mention the possibility of disciplinary sanctions by her peers in the House of Commons.

The subject of bribery is not so conjectural. It is not an offense under 18 U.S.C. §201 for a public official to corruptly seek or accept a monetary reward. Only when he does so in return for being influenced in his performance of official duties is the offense complete. If the public official is a Senator and the duties to be performed are legislative, an accusation of bribery would necessarily require proof of his intentions as manifested by his actual behavior. The present indictment does not charge mere corruption; it states that the object was to influence the appellee's "action, vote, and decision on postal rate legislation" — conduct which is unmistakably legislative in character and

within the sphere of activity directly related to his duties as a member of the Senate Committee on Post Office and Civil Service.

To suggest that a Senator may be prosecuted for what he does or what he fails to do or what he intends to do with respect to postal rate legislation, or to impute shadowy motives to his conduct with respect thereto, is to subvert the entire history, purpose, and prior applications of the Speech or Debate Clause. We need not reiterate the manifold objectives of the Clause; these have been discussed at length (App. Br. 20-49). Suffice it to say, as this Court has always held, "that the privilege should be read broadly, to include not only words spoken in debate, but anything generally done in a session of the House by one of its members in relation to the business before it". *United States v. Johnson*, 383 U.S. 169, 179 (1966); *Tenney v. Brandhove*, 341 U.S. 367, 374-376 (1951); *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). A Senator's deliberations and processes in reaching a decision on legislation preparatory to his actual votes assuredly meet this description.

In the *Johnson* case this Court considered and rejected the Government's argument, resurrected here, that the Speech or Debate Clause does not cover prosecutions founded on "the antecedent unlawful conduct of accepting or agreeing to accept a bribe". *Id.* 182. What the Government overlooked then, as it apparently does now (at least in oral argument), is that "the language of the Constitution is framed in the broadest terms" and "that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House". *Id.* 182-183. With respect to the hypothetical examples, it would be a narrow view of the privilege to hold it inapplicable where a legis-

lator "goes fishing" instead of casting a formal vote. If the prosecution can succeed only by proving what motivated his abstention, he need not answer the charges or face inquiry into any position taken on a legislative measure which came to him for decision.

Despite the restrictive approach adopted in oral argument, the Government is on record as conceding wide latitude to the Clause:

> Whatever the precise limits of *Johnson*, we do not contend that the Clause protects only speech. "Committee reports, resolutions, and the act of voting are equally covered, as are things generally done in a session of the House by one of its members in relation to the business before it" (Govt. Br. 11 n. 5).

When the Department of Justice is not engaged in prosecuting legislators, it champions the privilege. As it argued so cogently in briefing *Dombrowski v. Eastland*, 387 U.S. 82 (1967), wherein a Senator was charged as a conspirator with Louisiana officials, the conduct of a Senator is absolutely privileged if it relates to legislative concerns:

> The test is simply whether the act is such as is "generally done in a session of the House by one of its members in relation to the business before it" (*Kilbourn v. Thompson*, *supra* at 204) or whether the legislators "were acting in a field where legislators traditionally have power to act" (*Tenney v. Brandhove*, *supra* at 379). A legislator loses immunity only for conduct "that is in no wise related to the due functioning of the legislative process". *United States v. Johnson*, *supra* at 172.

Government Brief (31-32) in *Dombrowski v. Eastland*, 387 U.S. 82 (1967).

By claiming a power to punish a Senator in the courts for corruption in connection with his legislative duties,

the Government is really arguing that the executive and judicial branches may decide when and where and in what manner the Senator may discharge his public trust. But the purpose of the Clause was "to prevent intimidation by the executive and accountability before a possibly hostile judiciary". *United States v. Johnson*, 383 U.S. 169, 181 (1966) (involving a prosecution based upon allegations "that a member of Congress abused his position *by conspiring* to give a particular speech in return for remuneration from private interests"). If a Senator were indeed to sell his vote, that would be a grossly improper discharge of his legislative duties but nonetheless within the clear scope thereof. Is it compatible with the Speech or Debate Clause for a jury to decide whether he abused his trust by acting dishonestly? We think not, if *Tenney v. Brandhove*, 341 U.S. 367 (1951) serves as a reliable guide:

> * * * The privilege would be of little value if [legislators] could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. * * * In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. *Id.* 377-378.

It must be stressed that the privilege does more than insulate a legislator from attempts to punish him for the things he does and says in the performance of his legislative duties. The privilege also protects him against having to defend or explain his conduct in any way. As explained in *Powell v. McCormack*, 395 U.S. 486, 502-503 (1969):

> [T]he Clause not only provides a defense on the merits but also protects a legislator from the burden of defending himself [Citations omitted]. Our cases make it clear that the legislative immunity created by

> the Speech or Debate Clause performs an important function in representative government. It insures that legislators are free to represent the interests of their constituents without fear that they will be later called to task in the courts for that representation.

How a legislator performs legislative duties cannot be opened to inquiry in the courts, even though the legislator's methodology is deplorable. While the hypothetical cases posited during oral argument may appear extreme, the fact remains that a Senator who employs threats, accepts bribes, or commits assaults to achieve purely legislative ends has never been considered amenable to prosecution. Many such instances are recorded in the annals of Congress but have not been encountered in the courts. When confronted by analogous misconduct, this Court has consistently declined to authorize trial or punishment by a jury. *Kilbourn v. Thompson*, 103 U.S. 168 (1881) (false imprisonment by Congressmen asserting unconstitutional prerogatives); *Tenney v. Brandhove*, 341 U.S. 367 (1951) (obvious efforts to harass a witness in violation of Civil Rights Act); *United States v. Johnson*, 383 U.S. 169 (1966) (bribed speech); *Dombrowski v. Eastland*, 387 U.S. 82 (1967) (conspiracy with Louisiana officials to seize property and records in admitted defiance of Fourth Amendment). We do not believe that the hypothetical questions warrant a different approach.

The broad immunity of Senators can sometimes work to the detriment of individual citizens or harm national interests when it is abused. But the privilege exists, nonetheless, because the experience of history has demonstrated its necessity and because the federal judiciary has resolutely declined each and every invitation to relax it. To make its existence turn on the fine distinctions between the ultimate act of voting and the decisional processes ante-

cedent to such act, as urged on this appeal, is to further depreciate the independence of the people's representatives in our tripartite form of government.

B. The Senator Gravel Case

The Court has agreed to review another recent application of the Speech or Debate Clause, this one involving a grand jury inquiry into the activities of a United States Senator in divulging the contents of the so-called Pentagon Papers, which were a matter of concern to this Court in *New York Times Company v. United States*, 403 U.S. 713 (1971). The case is *United States v. Doe*, 332 F. Supp. 930 (D. Mass. 1971), modified and affirmed — F. 2d — (1st Cir.), decided January 7, 1972, certiorari granted *sub nom Gravel v. United States*, 40 U.S.L.W. 3398 (1972) (Nos. 71-1017 and 71-1026, this Term), February 22, 1972.

The *Doe* case arose when a staff member of Senator Gravel of Alaska moved to quash a subpoena ordering him to appeal before a federal grand jury investigating a myriad of crimes related to the release and dissemination of the Pentagon Papers. Although Senator Gravel was not personally subpoenaed, he intervened in the proceedings and moved to quash the subpoena issued to his staff assistant, Dr. Leonard S. Rodberg. Among the points urged by Senator Gravel and Dr. Rodberg was the contention that the subpoena contravened the Speech or Debate Clause.

It appears from the reported opinions that Senator Gravel, without authorization, obtained a copy of the Pentagon Papers at a time when publication was restrained by order of this Court. *New York Times Company v. United States*, 91 S. Ct. 2270 (1971). The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds,

and there is some controversy over the plausible relevance of these documents to the work of the Subcommittee. Nonetheless, Senator Gravel called a meeting of the Subcommittee, read to it a summary of the high points, and then introduced all 47 volumes of the Pentagon Papers as an exhibit.

Despite differences between the instant case and Senator Gravel's, there are striking similarities as well. In the first place, the grand jury was investigating alleged criminal activity in which a United States Senator played a key role. It was Senator Gravel's legislative conduct which linked him as a participant. The crimes under investigation included the retention of Government records with intent to convert (18 U.S.C. §641) and the gathering and *transmitting of national defense information* (18 U.S.C. §793). See *United States v. Doe*, 332 F. Supp. at 932. Under the Government's approach to the Speech or Debate Clause in this case, it would be arguable that Senator Gravel's "antecedent conduct" in obtaining allegedly stolen national defense material constituted a prosecutable criminal offense, although related to his role as a legislator, whereas his disclosure of such material to the Subcommittee would be privileged.

Second, the technique of inquiring into a Senator's conduct by subpoenaing his staff assistant has a direct parallel in the instant case. As made abundantly clear by the motions on file in the District Court and included in the record on this appeal, the indictment against Appellee was obtained primarily on the basis of grand jury testimony given by the Appellee's chief administrative aide, John L. Sullivan. Certainly it was not unrealistic for the District Court, in passing upon Appellee's motion to dismiss, to assume that the prosecution's case in chief would hinge in all probability upon the testimony of his trusted confidant.

Therefore, it is instructive to observe the manner in which the First Circuit dealt with these factors in the *Doe* litigation. Since its opinion has not yet been reported, it is printed in the Addendum hereto, *infra* at 32-45.

In reliance upon *United States v. Johnson*, 383 U.S. 169 (1966), the District Court sustained Senator Gravel's claim of privilege under the Speech or Debate Clause. It held that Clause applicable "to legislative acts *and antecedent conduct so intimately related to them such as cannot be proved without resort to inquiry into legislative acts*". *United States v. Doe*, 332 F. Supp. at 934 (italics added). Legislative acts were defined to include "things generally done in a session of the House by one of its Members in relation to the business before it", *id.* 935, in line with the classic formulation in *Kilbourn v. Thompson*, 103 U.S. 168, 204 (1881). Nor did the District Court perceive any justification for narrowing the scope of the Clause when criminal rather than civil liability is sought to be imposed:

> In view of the primary purpose of the privilege "to prevent intimidation by the executive and accountability before a possibly hostile judiciary", *United States v. Johnson*, *supra*, 383 U.S. at 181, 86 S. Ct. at 755, the protection of the privilege afforded by the Speech or Debate Clause may be broader in criminal proceedings than in civil. Therefore the court sustains Senator Gravel's claim that whatever he did at the subcommittee meeting on June 29 *and certain acts in preparation therefor* are privileged.

United States v. Doe, 332 F. Supp. at 935. Accordingly, the District Court issued a protective order forbidding grand jury inquiry of *any* witness about Senator Gravel's conduct at the Subcommittee meeting and "about things done by the Senator in preparation for and intimately related to said meeting". *Id.* 938.

This order was affirmed on appeal. In an opinion unfavorable to Senator Gravel in some respects, and although Senator Gravel "essentially lost his appeal", Addendum, *infra* at 45, the First Circuit adopted the District Court's rationale in prohibiting inquiry into the Senator's conduct antecedent to the subcommittee report. Chief Judge Aldrich, writing for a unanimous panel, conceded that the proceedings were not a frontal attack on the Clause in the form of a criminal prosecution for illegal conduct in obtaining classified information, but merely involved "the extent to which the constitutional privilege bars grand jury questioning". Addendum, *infra* at 38. In his opinion it was immaterial whether the questioning of such conduct occurs before the grand jury or before a petit jury. "The legislator need not answer questions anywhere." *Ibid.* Nor would it be consonant with the Speech or Debate Clause, according to that view, to shelter Senator Gravel's public disclosures while leaving his antecedent surreptitious conduct exposed to grand jury scrutiny and censure.

> It seems manifest that allowing a grand jury to question a Senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator. Addendum, *infra* at 38-39 (citations omitted).

The other facet of the *Doe* litigation pertinent to this appeal lies in the holding that the Government may not attempt by indirection what it cannot achieve directly. As stated, the District Court in *Doe* barred grand jury questioning of *any* witness concerning Senator Gravel's legislative activity and antecedent conduct. It also ordered that Dr. Rodberg, his staff assistant, "may not be ques-

tioned about his own actions * * * to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Building and Grounds or in preparation for and intimately related to said meeting". *United States v. Doe*, 332 F. Supp. at 938. In support of its holding the District Court reasoned that Dr. Rodberg's own activities were "also protected from investigation, not because of any privilege of his own but by reason of his having acted as the Senator's agent and assistant in the Senator's performing various legislative acts". *Id.* 937. To have ruled otherwise would have diluted and jeopardized the privilege itself, since a legislator's dependence upon confidential assistants is indispensable to the performance of legislative duties. *Ibid.*

The Court of Appeals was in agreement on this point also.

> It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. (Addendum, *infra* at 43.)

Even with respect to outside third parties, who were certainly not immune from inquiry as to their own conduct regarding the Pentagon Papers, the Speech or Debate Clause was held to impose limits where the object of questioning is to attack legislative motives. Thus Chief Judge Aldrich stated that "it could not be shown that the defendant's speech was written by a constituent or that the defendant was paid to deliver it". Addendum, *infra* at 44. Accordingly, the District Court was instructed to fashion an order "that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information or

with his aides during such period directed to the intervenor's motives or purpose in introducing the Papers into the subcommittee records". Addendum, *infra* at 45.[9]

The balanced approach to the Speech or Debate Clause in the *Doe* litigation, at two stages of federal judicial review, stands in stark contrast to niggardly reading advocated here by the Government. What the Department of Justice has already done, as the record reveals on the present appeal, is to winnow out confidential information from a Senator's "trusted" aide and to parade it before a grand jury, without any semblance of the protective safeguards mandated in *Doe*. The Appellee's trial promised to be a repeat performance, in all likelihood tracing his conduct from alleged payment through the entire legislative routine — to discussions with staff members; to informal communications with Senate colleagues, constituents, and lobbyists; to committee sessions; to ultimate vote on the floor of the Senate — all in relation to postage rate legislation. Perceiving in the indictment a design to bring legislative conduct of a Senator into disrepute, the District Court rightly declined to entertain further proceedings.

C. The Senator Hartke Case

In our treatment of the Speech or Debate Clause, we have investigated other arenas of public decision-making in which there has been a "textually demonstrable constitutional commitment" to the Senate (App. Br. 49-63). One such arena is the power to judge elections staked out in Section 5 of Article I, as construed by *Reed v. County Commissioners of Delaware County, Pennsylvania*, 277

[9] For a still more recent holding to the same effect as to staff assistants, see *Doe v. McMillan*, 40 L.W. 2471 (D.C. Cir. 1972), decided January 20, 1972.

U.S. 376 (1928); *Barry v. United States ex rel. Cunningham*, 279 U.S. 597 (1929), and other decisions of this Court which were fully canvassed in the Brief for Appellee. Both opinions in *Roudebush v. Hartke*, 40 U.S.L.W. 4171 (1972) (Nos. 70-66 and 70-67, this Term), decided February 23, 1972, lend further support to our submission that the exclusive competence of the Senate under the Speech or Debate Clause to judge the legislative performance of its Members is an integral part of the configuration of constitutional powers vested in that body by Article I of the Constitution.

CONCLUSION

For the reasons stated in the Brief for Appellee, as amplified herein, we respectfully submit that the appeal should be dismissed for want of jurisdiction or, in the alternative, that the judgment of the District Court be affirmed.

Respectfully submitted,

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March, 1972

ADDENDUM

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Re: *United States v. Brewster, et al.*

Gentlemen:

Pursuant to our agreement, this afternoon I personally hand-delivered a copy of the Memorandum of Conferences dated March 23, 1970 to Judge Hart for his in camera inspection. I indicated to him that we were in the process of preparing an appropriate protective order in order that this Memorandum not be released so as to generate prejudicial

publicity prior to trial. The Judge indicated that he would rather have this matter handled by stipulation. I told him that I thought this was entirely appropriate and such a stipulation would be drafted.

Sincerely,

WOB:gap WILLIAM O. BITTMAN

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 71-1331
and 1332

UNITED STATES OF AMERICA,

v.

JOHN DOE.

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1335

UNITED STATES OF AMERICA,
Appellant,

v.

JOHN DOE.

Appeals from the United States District Court
for the District of Massachusetts

Before ALDRICH, *Chief Judge*,
McENTEE and COFFIN, *Circuit Judges*.

David R. Nissen, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, and *War-*

ren P. Reese, Assistant United States Attorney, were on brief, for the United States.

Robert Reinstein and *Herbert O. Reid, Sr.* with whom *Charles L. Fishman* was on brief, for Mike Gravel, United States Senator.

Doris Peterson, *Peter Weiss*, *James Rief*, and *Morton Stavis* on brief, for Leonard Rodberg, Amicus Curiae in case No. 71-1335.

January 7, 1972

ALDRICH, *Chief Judge*. These cross appeals raise important questions as to the extent of the privilege afforded by the Speech or Debate Clause of the Constitution. This clause, the separate and concluding part of Article I, Section 6, Clause 1, provides that ". . . for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The issues arise in the context of a motion to limit the testimony that can be presented to a federal grand jury. The facts are these.

A copy of classified Defense Department documents, now widely known as the Pentagon Papers, containing hitherto unpublished facts concerning the background and conduct of the Vietnam War, found itself, unauthorizedly, in the hands of Senator Gravel, the junior senator from Alaska. The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He called a meeting of the subcommittee, read to it a summary of the high points, and then introduced the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit. Thereafter, he allegedly supplied a copy of the Papers to the Beacon Press, a Boston publishing house, owned by the Unitarian-Universalist Society, for publication.

These matters and the events preceding them have attracted the attention of a grand jury in the Massachusetts District. The court found, "The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371)." (Strictly, the court misused the word "public.")

Among other summoned witnesses were Leonard S. Rodberg, a legislative assistant to Senator Gravel, and Howard Webber, director of M.I.T. Press. Rodberg objected to testifying, on the ground of invasion of his First Amendment rights of freedom of association and freedom of the press, and in addition, on the ground that as a legislative assistant to the Senator, he is protected by the Speech or Debate clause. The Senator himself has not been called, and the Department of Justice has stated that it has no intention of calling him. The court, however, permitted the Senator to intervene in the proceedings for the purpose of arguing that his own privilege under the Speech or Debate clause requires that the subpoenas issued to Rodberg and Webber be quashed, and that a protective order be issued suppressing certain other testimony. The resulting order the Senator, as the present appellant, finds too limited, and the government, as cross-appellant, too broad.

JURISDICTION

The government, correctly, points out that if the subpoena that was sought to be quashed was directed to intervenor, there could be no appeal from the refusal to quash unless he took the further step of refusing to comply, and was adjudi-

cated in contempt. *Cobbledick v. United States*, 1940, 309 U.S. 323; *United States v. Ryan*, 1971, 402 U.S. 530. Here, however, the subpoena was not addressed to intervenor, but to third parties who could not be counted on to risk contempt in order to protect intervenor's constitutional rights. *See United States v. Ryan*, ante, at 533. Hence he was "powerless to avert the mischief of the order" unless permitted to appeal it. *Perlman v. United States*, 1918, 247 U.S. 7, 13. The government's effort to take the case outside the *Perlman* exception, by arguing that intervenor will not suffer irreparable injury if the grand jury hears the evidence, assumes the correctness of its claims that no injury is cognizable unless and until intervenor is indicted. *Perlman*, however, illustrates that, to the contrary, a court, in determining whether an intervenor will suffer irreparable injury unless allowed to appeal, should assume his claim to be correct. We hold, therefore, that the order denying intervenor's motion is appealable.

The Issues

The court's order, so far as presently material, provided as follows:

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor about things done by the Senator in preparation for and intimately related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

This order was preceded by a comprehensive recitation of facts, some of which we do not repeat, and discussion of the legal principles. *United States v. John Doe, In re Rodberg*, D.C. Mass., 1971, 332 F. Supp. 930. By a subsequent order the court refused further relief, except for a brief temporary stay, which we extended.

The response of both parties is extreme. Intervenor's brief suggests that the entire inquiry is improper.

> "There probably is no clearer case of the prostitution of the grand jury process than is daily evidenced [here]. . . . This Court is thus presented by the government with a flagrant misuse of the subpoena power of the grand jury. . . . [by the executive]. This represents a fundamental perversion of the function of the grand jury. . . ."

The government does not make the rejoinder that intervenor's own action in disclosing documents which were, in his own words, "critical of Executive conduct in foreign affairs," had no conceivable relevance to the functions of the Subcommittee on Public Buildings and Grounds; a matter which would seem self-evident.[1] While recognizing that that claim would be (at least largely, see post) irrelevent, it does take the extreme position that while legislators may not be questioned "for" their speech or debate, in the sense of being held accountable, they may be freely questioned "about" them.

"Speech or Debate"— The Scope of the Privilege

The areas in which intervenor objects to questioning are three — speech or debate itself, or publication; preparation,

[1] Nor does the government point out that intervenor, although relying elsewhere on the public's "right to know," (*see* n. 5, post) basically is seeking to block exposure of how he exposed what, in turn, the Executive did not wish to have exposed.

or pre-publication, and, finally, republication. We will consider them in that order.

a) *Publication*

For what he says or does on the floor of the Senate, or before the subcommittee, intervenor is concededly protected by an absolute privilege from all criminal and civil liability. *See United States v. Johnson*, 1966, 383 U.S. 169; *Tenney v. Brandhove*, 1951, 341 U.S. 367. It is equally clear that this protection extends to any written reports of the committee proceedings addressed to Congress, including material unspoken at the hearing but inserted directly into the record. *See Kilbourne v. Thompson*, 1880, 103 U.S. 168, 204; *McGovern v. Martz*, D.D.C., 1960, 182 F. Supp. 343, 347. The privilege protects against a claim of irrelevancy, *see Cochran v. Couzens*, D.C. Cir., 1930, 42 F. 2d 783, 784, as well as of falsity and malice. The government would argue that intervenor could be questioned "about" his conduct for this very reason, drawing the analogy that one who is immune from prosecution cannot claim the protection of the Fifth Amendment.

In our view this misconceives the scope and purpose of the Speech or Debate clause, which is not principally to protect the person and pocketbook of legislators, but, rather, is to ensure freedom of debate. *United States v. Johnson*, ante, at 180-82. Intimidation of a legislator, harassment, embarrassment with the electorate, all may be achieved short of obtaining a criminal or civil judgment. *Cf. United States v. Johnson*, 4 Cir., 1964, 337 F. 2d 180, 191, *aff'd*, 383 U.S. 169. Since these consequences can flow from mere inquiry, the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy. *Id.* Further, although it seems to us relatively less important, the time required to respond to

such an inquiry would be inconsistent with another purpose of the Speech or Debate clause, which is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks." *Powell v. McCormack*, 1969, 395 U.S. 486, 504; *see Tenney v. Brandhove*, ante, at 377. We cannot accept the government's distinction between questioned "for" and questioned "about."[2] Nor do we think that the place of questioning, whether it be before the grand jury or before a petit jury, determines its palatability. The legislator need not answer questions anywhere.

b) *Pre-publication*

Turning to the pre-publication period, we note that we are concerned not with whether a legislator may be protected from prosecution for illegal conduct in obtaining information for use in a congressional proceeding, but only with the extent to which the constitutional privilege bars grand jury questioning. Different considerations may well apply. Effective debate presupposes access to facts. *See generally* Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 36 (1968). Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, *see Stockdale v. Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill

[2] On the other hand, while we are discussing terminology, except insofar as his hypothetical quoted above may so suggest, we do not believe intervenor contends that his constitutional protection against questioning means that the government cannot prove alleged wrongful acts by others which, by implication, may bring his own conduct "into question." There could be no merit in such a claim.

both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. *Cf. Caldwell v. United States*, 9 Cir., 1970, 434 F. 2d 1081, *cert. granted* 402 U.S. 942. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, *cf. Dombrowski v. Eastland*, 1967, 387 U.S. 82, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator.[3] To what other persons this protection may extend we will consider later. All government action cannot be frozen in the name of chilling speech. *Cf. United States v. O'Brien*, 1968, 391 U.S. 367.

c) *Republication*

Intervenor in his appeal contends that the clause comprehends not only the delivery of a congressional speech and conduct antecedent thereto, but also conduct subsequent to the speech aimed at its wider dissemination, including private republication. Apart from republication such as in the news media or the Congressional Record, which is the natural consequence of a speech and is necessarily protected, *see McGovern v. Martz*, ante, at 347, no American court appears to have decided this question.[4] *But cf. id.; Long v. Ansell*, D.C. Cir., 1934, 69 F. 2d 386, 389, *aff'd* 293

[3] In *New York Times v. United States*, 1971, 403 U.S. 713, the Court accommodated related free speech interests in holding that the newspaper's conduct could not be enjoined, although, as pointed out in Mr. Justice White's concurring opinion, it may have been criminal. *Id.* at 730-41.

[4] We put to one side cases refusing an injunction, as involving different considerations. *See Hentoff v. Ichord*, D.D.C., 1970, 318 F. Supp. 1175; *Methodist Federation for Social Action v. Eastland*, D.D.C., 1956, 141 F. Supp. 729; *cf. New York Times v. United States*, n. 3 ante. In the more common situation, it has long been settled that the publication of defamation, although actionable, may not be enjoined. *Hart v. Crosby v. Bradstreet Co.*, 2 Cir., 1963, 312 F. 2d 483, 485, *cert. denied* 373 U.S. 911; *Kidd v. Horry*, CC. E.D. Pa., 1886, 28 F. 773.

U.S. 76. In urging us to resolve it in his favor, intervenor acknowledges that it will not affect his freedom to speak, since the speech has already been made, but argues that republication is essential to the "due functioning of the legislative process," *United States v. Johnson*, ante, 383 U.S. at 172, and is "generally done" by members of Congress.[5] *Kilbourne v. Thompson*, ante, at 204. *See also Stockdale v. Hansard*, ante, at 150, 1169. The difficulty is that the term "legislative process" is no more self-defining than "Speech or Debate." The language and history of the Speech or Debate clause is a surer guide to the scope of the privilege than catch-phrases, and we find in both a focus upon matters occuring in the course of deliberation. This had been the English concept upon which our privilege had been patterned.[6] Two English cases, decided shortly after the enactment of the American constitution, held that the parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their parliamentary speeches. *Rex v. Creevey*, 1813, 1 Maule & Selwyn 273; *Rex v. Lord Abington*, 1795, 1

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[5] "The Framers presuppose[d] the maximum amount of communication between the citizens and their elected representatives."

"The people must be informed fully of the workings of government."

"The heart of representative democracy is the communicative process between the people and their agents in government."

"Informing the electorate is a 'legislative act' since it is clearly 'related to the due functioning of the legislative process.' *United States v. Johnson*, *supra* at 172. In fact, it is not exaggeration to say that direct communication between a Member of Congress and the electorate is an essential bedrock of the legislative process, for it insures that the people will inform *him and his colleagues* [sic] of their well-considered views on pending and future legislation — an indispensable prerequisite for each Congressman deciding how to cast his own vote."

[6] "[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *Kilbourne v. Thompson*, ante, at p. 202.

Esp. N.P. Cases 223. See generally T. E. May, Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. F. Fellowes & T.G.B. Cocks 1957); C. F. Wittke, The History of English Parliamentary Privilege 23-32 (1921). Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberations. *See Kilbourne v. Thompson*, ante; *Coffin v. Coffin*, 1808, 4 Tyng (Mass.) 1.

We do not find private republication within that category. The fact that it may be customarily done by members of Congress is not the answer.[7] Only those acts by which a congressman ordinarily expresses to the House his views on matters before it come within the Supreme Court's extension of the privilege to "things generally done . . . *in relation to the business before [Congress]*." *Kilbourne v. Thompson*, ante, at 204. (Emphasis supplied).

Intervenor's argument that communicating with the electorate is essential to effective deliberation because it elicits responses to guide his legislative decisions and because it helps to put pressure upon other legislators, (n. 5, ante, 4) proves too much. If accepted, it would bring within the privilege not only republished congressional speech, but speeches delivered anywhere. But even restricted to repeating what has once been said in a legislative context, the consequences of an unlimited absolute privilege would be staggering. We do not believe intervenor has struck

[7] *Cf. United States v. Johnson*, ante, at 172. There the Court observed that an attempt to influence the Department of Justice in favor of a constituent was unprotected, yet assisting constituents is just as customary a function as communicating with them. See generally V. O. Key, Politics, Parties and Pressure Groups (3d ed. 1952); R. Davidson, The Role of the Congressman 99 (1969).

such gold in a field previously thought to be barren.[8] The fact that some repetition may be inevitable does not mean that there should be immunity to add to it. *Cf. Murray v. Brancato*, 1943, 290 N.Y. 52 (no privilege for judge to circulate privately a calumnious opinion); see Annot., 146 ALR 913. We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto.[9]

The fact that republication is not within the constitutional privilege does not exclude consideration of other protection. To the extent that a congressman has responsibility to inform his constituents, his performance of that responsibility may be protected from liability by a common law privilege, as is an executive official's. A news release about the speech may well be as protected as the speech itself. *Cf. Barr v. Mateo*, 1959, 360 U.S. 564 (absolute immunity given executive officer for libel contained in news release). How far this immunity should go will depend upon the facts of the particular case. An even more difficult question is whether the measure of the grand jury's right to make personal inquiry of the legislator follows the immunity. Arguably, it may go further, or not so far. Because we do not consider this a matter of present substantial im-

[8] Those with long memories may recall the frequent, but unaccepted, challenges to a former junior senator from Wisconsin to repeat outside the walls of Congress the calumnies he often expressed within their protection. If our memory is correct, we would see no reason for distinguishing between the types of legislative speech that could be repeated.

[9] Examples might be multiplied. If an unpublished manuscript was stolen by parties unknown and subsequently was introduced into the records of a Congressional committee, could it be thought that the common law copyright was lost by reason of the Speech or Debate clause? Or, in the case of a published work, that the statutory copyright would thereby be extinguished?

portance, and partly because the court is not in total agreement, we presently resolve it, without binding ourselves for future purposes, if the matter is more sharply put, that he may not be questioned at all as to republication.[10] We do not, of course, mean by this that we are ruling, even tentatively, on the limits of criminal liability.

WITNESSES PRECLUDED

It may be wondered why, since under *Cobbledick v. United States*, ante, until he has been held in contempt we apparently have no jurisdiction to advise intervenor as to the measure of his immunity from testifying, we have nevertheless been answering that question. The reason is that such answer is a necesssary condition to passing upon the immunity of others, such as Rodberg, who intervenor claims in this appeal to come under his legislative protection. We now turn to this.

a) *Legislative Aides*

It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. To the extent, if any, that there might be exceptions, again, for present purposes, we do not inquire. We note, however, that this synonymity is founded upon the relationship, not on the fact of employment. Rodberg, for example, is not protected from inquiry as to events unconnected with intervenor at the time of occurrence. We reject intervenor's contention that the fact of hiring insulated him from all inquiry as to

[10] In part we do this because we propose, so far as possible, to make a practicable decision that avoids unnecessary or doubtful points that might burden the Supreme Court.

prior events related to the Papers, but not to intervenor. *See Heine v. Raus*, 4 Cir., 1968, 399 F. 2d 785, 790-91.

b) *Third Parties*

United States v. Johnson, ante, holds that any person who dealt with a legislator with respect to speech or debate can not be inquired of if the object is to attack the legislator's motives in speaking. Specifically, it could not be shown that the defendant's speech was written by a constituent or that the defendant was paid to deliver it. The Court did not suggest that a legislator was free in all respects from criminal prosecution. *But see id.*, at 185. Indeed, were it to be thought so, one need only turn to the other portions of the Clause, which regulates, procedurally, criminal trials. With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with intervenor or his aides. We have already spoken as to Rodberg, pre-employment. At the other end, so far as intervenor's privilege is concerned, we hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question,[11] that whatever Beacon Press did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not com-

[11] We infer that intervenor believes it does, in the light of a contempt proceeding he instituted when he erroneously believed the United States Attorney was using a subpoena to examine the Beacon Press records during the processing of this appeal.

parable to a payment for initially delivering the speech. Similarly, the district court's refusal to include Webber in its order was correct.

PROCEDURE

Intervenor has presented us with a request covering the type of witnesses he believes should be excluded altogether, and an elaborate procedure for the court to employ as to testimony the government proposes to introduce through other witnesses. Much of this request goes by the board with our rejection of some of his basic premises. As to the rest we find such procedure unnecessarily cumbersome, and suggest a simpler solution. Intervenor may supply a list of his personal aides, and the dates of their employment. Upon the court's being satisfied as to the correctness of the list it shall order that no questions be asked of any of them relating to the Pentagon Papers or to intervenor's legislative activities during the period of their employment. It shall further order that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information, or with his aides during such periods, directed to intervenor's motives or purpose in introducing the Papers into the subcommittee records. We believe the contempt power of the court will be a sufficient guarantee of enforcement without the need of adopting intervenor's extraordinary request that every question be submitted to him for approval before it is asked.

Except to the extent that it is modified herein the order of the district court is affirmed. Even though intervenor has essentially lost his appeal, we do not believe this an appropriate case in which to award costs.

FILE COPY

No. 70-45

In the Supreme Court of the United States

OCTOBER TERM, 1971

UNITED STATES OF AMERICA, APPELLANT

v.

DANIEL B. BREWSTER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES ON REARGUMENT

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INDEX

	Page
Jurisdiction	1
The offense is complete when the bribe is solicited or received with the requisite intent; No proof that official action was or was not taken is required	3
The statutory history	8
Conclusion	12

CITATIONS

Cases:	
Bartop v. United States, 202 U.S. 344	7, 8
United States v. Johnson, 383 U.S. 169	7, 8
United States v. Manton, 107 F. 2d 834	5
Constitution and statutes:	
Constitution of the United States, Art. I, Sec. 6, Speech or Debate Clause	2, 3, 4, 5, 6
Act of February 26, 1853, c. 81, 10 Stat. 170, Sec. 6	8
Act of October 23, 1962, P.L. 87-849, 76 Stat. 1119	11
Criminal Code (Act of March 4, 1909, c. 321, 35 Stat. 1088), Sec. 110	10
Revised Statutes (1878 ed.):	
Sec. 5450	9, 10
Sec. 5500	9, 10
18 U.S.C.:	
Sec. 201	11
Sec. 201 (c)	3, 4
Sec. 201 (g)	3, 4
Secs. 201-213 (1958 ed., Supp. V)	11
Sec. 205 (1958 ed., Supp. V)	11
Sec. 205	11
Miscellaneous:	
Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960)	11
Federal Conflict of Interest Legislation, Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong. 2d Sess., dated March 1, 1958	11
H. Rep. No. 748, 87th Congress, 1st session	11
S. Rep. No. 2213, 87th Congress, 2d Sess.	11

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I

JURISDICTION

In his Supplemental Brief, the appellee contends that the decision below "amounted to a summary judgment on the merits" (Br. 3), and that it "'was in reality an acquittal * * *'" (Br. 12). This contention rests largely on a memorandum which is not in the record before this Court, and which appellate counsel for the government had not heard of prior to the appellee's oral argument in this Court.

It is clear, of course, that the appellee was not "in jeopardy" before the district court. No jury had been empanelled; no trial had been commenced before the

judge. There is nothing to indicate that the defendant was present. The only proceeding in the district court was to hear and determine the defendant's Motion to Dismiss (App. 8), which, with respect to the odd-numbered counts of the indictment (the only ones relating to defendant Brewster), asserted that the defendant was charged with being influenced in, or because of, "official acts in his capacity as a United States Senator," and that each count "violates the provision of Article I, Section 6 of the United States Constitution."

This Motion to Dismiss presented no issue of fact for the judge's determination. It raised only a question of law. As the court's order recites (App. 34), "This matter having come before the Court for a hearing on the defendant's motion to dismiss the indictment," it was "Ordered that the defendant's motion be granted, and the indictment be and hereby is dismissed." There is a reference to the "reasons stated orally by the Court." When those reasons are examined, however, their substance is that: "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution * * * shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act" (App. 33).

This is not a factual decision, or a summary judgment, or an acquittal (in a trial which had not begun). It is a decision on a motion to dismiss, based on a determination of constitutional law, as applied to the language of the indictment. In the circumstances before the district court, the "confidential memorandum"

was in the nature of an informal bill of particulars. It may have put some flesh on the allegations of the indictment, but it did not alter those allegations—no contention is now made that it did. The decision of the district court was not that the *facts* did not support the *allegations* in the indictment; the decision was that the *allegations* did not charge an offense because of the Speech or Debate Clause. The critical legal issue was contained within the four corners of the indictment and the terms of the indictment provided the grounds of the court's dismissal. That is a decision of law, dismissing an indictment on the ground that the statute under which it is brought is unconstitutional as applied to the facts alleged. It is also the granting of a motion in bar, since the Speech or Debate Clause is used "like a pardon or the statute of limitations in another context" to bar a prosecution which otherwise would be plainly covered by the statute. On either basis there is jurisdiction in this Court to review the decision under the pre-1971 version of the Criminal Appeals Act.

II

THE OFFENSE IS COMPLETE WHEN THE BRIBE IS SOLICITED OR RECEIVED WITH THE REQUISITE INTENT; A SHOWING THAT OFFICIAL ACTION WAS OR WAS NOT TAKEN IS REQUIRED

The indictment in this case was brought under Section 201(c) and Section 201(g) of Title 18 of the United States Code. These provisions punish the crime for a public official to solicit or receive anything of value "in return for * * * being influenced

performance of any official act" (Section 201
official act performed or to
(Section 201(g)(1). The essence of
was that the Speech or Debate
Senator Brewster, constitutionally
prosecution for alleged bribe
App. 33a. This is not a
which to prove its case, the government
legislative activity, for
The government need only
was" in connection with the per
" App. 33a; quoted
Br. 15).
corrupt intent, see, e.g.,
any official act is in fact thereafter
This, the offense could be committed with
Speech or Debate at all; whether the inten
official action occurred because of a
agreement on the part of the public official, or
official action was thwarted by illness, or
the public exposure of the bribe. Regard
breadth of the protection of the Speech
Clause, proof of the offense charged under
could be made without proving any
Debate whatever. All that is required is
tentation or receipt of a bribe, with the
construction of the statute the words
"demands, solicits, seeks" in the statute
application or effectiveness. When a
asks to do an act, and this is brought

to the attention of the proper authorities, it would be odd if they had to wait until he had done the act because they could take official action. If a Senator says to a constituent: "I demand $10,000 if you want me to vote for your bill," and that statement, supported by adequate evidence, is made known to the United States Attorney, a fair construction of the statute is that he can move at once, and that he would not be performing his duty if he replied: "We will watch the Senator, and if he does vote for your bill, then we can proceed against him. In the meantime you had better give him the $10,000, and we will protect you against a charge of paying a bribe. If you do not give him the $10,000, he may not speak and vote for your bill, and then we could never prosecute him."

If this is the proper construction of the solicitation words in the statute, it should likewise be the proper construction of "received" in the same statute, that is, that it applies to the receipt with the requisite intent, regardless of whether any Speech or Debate actually occurs. In any event, the indictment before the Court charges that the defendant "asked, solicited, sought, accepted, received and agreed to receive" a bribe in return for his influence. That offense was complete when the bribe was solicited or received, with the requisite intent, regardless of any proof of actual Speech or Debate. Cf. *United States v. Myerson*, 167 F. 2d 834, 845 846 (C.A. 2).

Moreover, there are many sorts of official actions which may be taken by a Senator which do not amount to Speech or Debate within a proper construction of that Clause in the Constitution. It is true that the

proper limits of the Speech or Debate Clause are not wholly clear as a matter of language, of grammatical construction, or under this Court's decisions. Nevertheless, the words used in the Constitution are "any Speech or Debate in either House." That clearly applies to speeches on the floor, or debates engaged in on the floor of the House or Senate by a member. It is not as clear—verbally, at least—that it applies to votes, though that need not be determined in this case. How far the Speech or Debate clause applies to the gathering of material in preparation for a Speech or Debate, or to staff members engaged in such gathering of material, has not been determined, and need not be determined in this case."

Whatever the eventual results are on such problems, there are surely many actions which a Senator takes which do not amount to Speech or Debate, and do not come within that Clause unless it is to be construed to grant immunity to a Senator for any act he does as a Senator, without regard to whether it can be called Speech or Debate, or has any fair relation to Speech or Debate. He may write a letter to a constituent; he may speak to another Senator in his office or in the corridor or on the telephone; he may call or write to an officer in the Executive Branch of the government to encourage or request that officer to propose certain legislation, or to refrain from proposing it. It seems hard to think that any such actions can fairly or properly be construed to constitute "Speech or Debate in either House," or that those words of the Constitution need be given such a broad construction for the purpose of giving adequate protection to Senators or

Members of the House in the performance of their duties, or against the excessive zeal of the Executive or Judicial branches of the government.

This is made particularly clear when we see that Congress has itself provided legislation which has long been in effect for 109 years making it a crime for a Congressman or Senator to solicit or receive a bribe. It seems unlikely that Congress thought it was violating the Constitution when it passed this statute in 1853, and repeatedly repassed it, and finally re-enacted it in 1962. There is no adequate reason for this Court to decide that Congress did not understand its when it passed this statute. As this Court said in *Burton v. United States*, 202 U.S. 344, 367, a related situation:

> it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes, not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it.

And, as the Court likewise said in the *Burton* case, *ibid.*, the statute

> can be executed without in any degree impinging upon the rightful authority of the Senate over its members or interfering with the discharge of the legitimate duties of a Senator.

There is no reference in this indictment to any speech or debate in the Senate. This is thus a clear distinction from the situation in *United States v. Johnson*, 383 U.S.

169, where, as this Court observed, the speech was specifically charged as a part of the conspiracy (383 U.S. at 184), and a substantial portion of the trial was devoted to the content of the speech and its authorship (383 U.S. at 173-176).

III

THE STATUTORY HISTORY

The history of the statutory provision was not fully developed in our main brief, and it is summarized here for the possible convenience of the Court.

The original statute relating to bribery of Congressmen or Senators was section 6 of the Act of February 26, 1853, c. 81, 10 Stat. 170, 171. This reads as follows:

> SEC. 6. *And be it further enacted*, That if any person or persons shall, directly or indirectly, give, offer, or promise any money, office, or place of profit or trust, or any other valuable consideration whatever, to any member of the Senate or House of Representatives of the United States, with intent to influence his vote or decision on any question, matter, cause, or proceeding which may then be pending, or may by law, or under the Constitution of the United States, be brought before him in his official capacity, or in his place of trust or profession, and the member, officer, or person who shall in any wise accept or receive the same, or any part thereof, shall be liable to indictment as for a high crime and misdemeanor in any court of the United States having jurisdiction for the trial of crimes and misdemeanors, and shall, upon conviction thereof, be fined not exceeding three times the amount

> so offered, promised, or given, and imprisoned in a penitentiary not exceeding three years; and the person convicted of so accepting or receiving the same, or any part thereof, if an officer or person holding any such place of trust or profit as aforesaid, shall forfeit his office or place; and any person so convicted under this section shall forever be disqualified to hold any office of honor, trust, or profit, under the United States.

This provision was carried forward into two sections of the Revised Statutes. These appear as section 5450 and 5500 of the Revised Statutes (1878 ed.), and read as follows:

> SEC. 5450. Every person who promises, gives, or causes or procures to be promised, offered, or given, any money or other thing of value, or makes or tenders any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of any thing of value, to any member of either House of Congress, either before or after such member has been qualified or has taken his seat, with intent to influence his vote or decision on any question, matter, cause, or proceeding which may be at any time pending in either House of Congress, or before any committee thereof, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made, or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and shall be [illegible] not more than three times [illegible]
>
> SEC. 5500. Any member of either House of Congress who asks, accepts, or receives any money, or any promise, contract, [illegible]

obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, either before or after he has been qualified, or has taken his seat as such member, with intent to have his vote or decision on any question, matter, cause, or proceeding which may be at any time pending in either House, or before any committee thereof, influenced thereby, shall be punished by a fine not more than three times the amount asked, received, or received, and by imprisonment not more than three years.

These provisions of the Revised Statutes were carried forward into Section 110 of the Criminal Code, Act of March 4, 1909, c. 321, 35 Stat. 1088, 1108. Section 110 reads as follows:

> SEC. 110. Whoever, being elected or appointed a Member of or Delegate to Congress, or a Resident Commissioner, shall, after his election or appointment and either before or after he has qualified, and during his continuance in office, directly or indirectly, ask, accept, receive, or agree to receive, any money, property, or other valuable consideration, or any promise, contract, undertaking, obligation, gratuity, or security for the payment of money or for the delivery or conveyance of anything of value, to him or to any person with his consent, connivance, or concurrence, for his action, vote, or support, or with the intent to have his action, vote, or decision influenced, on any question, matter, cause, or proceeding, which may at any time be pending in either House of Congress or before any committee thereof, or which by law or under the Constitution may be brought be-

> fore him in his official capacity, or in his place as such Member, Delegate, or Resident Commissioner, shall be fined not more than three times the amount asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place, and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States.

By 1958, this had become 18 U.S.C. 205 (1958 ed.), without any material change of wording.

At about that time, there was extensive consideration by the House Judiciary Committee of all the statutes relating to bribery and conflict of interest, and a suggestion, apparently originating in the House Committee staff, that all of these statutes should be all brought together and consolidated. See Federal Conflict of Interest Legislation, Staff Report to Subcommittee No. 5, House Committee on the Judiciary, 85th Cong., 2d Sess., dated March 1, 1958. Compare Association of the Bar of the City of New York, Conflict of Interest and Federal Service (1960).

The eventual result was the statute involved in this case (which was enacted by the Act of October 23, 1962, Public Law 87-849, 76 Stat. 1119. This repealed sections 201-213 of Title 18 U.S.C. as it then existed and enacted new provisions including section 201 involved in this case. The reports of the two congressional Committees are H. Rep. No. 748, 87th Congress, 1st Session; S. Rep. No. 2213, 87th Congress, 2d Session.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
Assistant to the Solicitor General.

MARCH 1972.

(Slip Opinion)

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* BREWSTER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 70–45. Argued October 18, 1971—Reargued March 20, 1972—Decided June 29, 1972

Appellee, a former United States Senator, was charged with the solicitation and acceptance of bribes in violation of 18 U. S. C. §§ 201 (c) (1) and 201 (g). The District Court, on appellee's pretrial motion, dismissed the indictment on the ground that the Speech or Debate Clause of the Constitution shielded him "from any prosecution for alleged bribery to perform a legislative act." The United States filed a direct appeal to this Court under 18 U. S. C. § 3731, which appellee contends this Court does not have jurisdiction to entertain because the District Court's action was not "a decision or judgment setting aside, or dismissing" the indictment but was instead a summary judgment on the merits based on the facts of the case. *Held:*

1. This Court has jurisdiction under 18 U. S. C. § 3731 to hear the appeal, since the District Court's order was based upon its determination of the constitutional invalidity of 18 U. S. C. §§ 201 (c) (1) and 201 (g) on the facts as alleged in the indictment. Pp. 3–6.

2. The prosecution of appellee is not prohibited by the Speech or Debate Clause. Although that provision protects members of Congress from inquiry into legislative acts or the motivation for performance of such acts, *United States* v. *Johnson*, 383 U. S. 169, 185, it does not protect all conduct *relating* to the legislative process. Since in this case prosecution of the bribery charges does not necessitate inquiry into legislative acts or motivation, the District Court erred in holding that the Speech or Debate Clause required dismissal of the indictment. Pp. 6–27.

Reversed and remanded.

Syllabus

BURGER, C. J., delivered the opinion of the Court, in which STEWART, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS, J., joined. WHITE, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant, v. Daniel B. Brewster. | On Appeal from the United States District Court for the District of Columbia Circuit.

[June 29, 1972]

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

This direct appeal from the District Court presents the question whether a Member of Congress may be prosecuted under 18 U. S. C. §§ 201 (c)(1), 201 (g), for accepting a bribe in exchange for a promise relating to an official act. Appellee, a former United States Senator, was charged with five counts of a 10-count indictment.[1] Counts one, three, five, and seven alleged that on four separate occasions, appellee, while he was a Senator and a member of the Senate Committee on Post Office and Civil Service,

> "directly and indirectly, corruptly asked, solicited, sought, accepted, received and agreed to receive [sums] . . . in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity . . . in violation of Sections 201 (c)(1) and 2, Title 18, United States Code."[2]

[1] The remaining five counts charged the alleged bribers with offering and giving bribes in violation of 18 U. S. C. § 201 (b).

[2] 18 U. S. C. § 201 (c)(1) provides: "Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives,

Count nine charged that appellee

> "directly and indirectly, asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive [a sum] . . . for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity . . . in violation of Sections 201 (g) and 2, Title 18, United States Code."

Before a trial date was set, the appellee moved to dismiss the indictment on the ground of immunity under the Speech or Debate Clause, Art. I, § 6, of the Constitution, which provides:

> "for any Speech or Debate in either House, they [Senators or Representatives] shall not be questioned in any other Place."

After hearing argument, the District Court ruled from the bench:

> "Gentlemen, based on the facts of this case

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or agrees to receive anything of value for himself or for any other person or entity, in return for:

"(1) being influenced in his performance of any official act . . . [shall be guilty of an offense]."

18 U. S. C. § 201 (a) defines "public official" to include "Member of Congress." The same subsection provides: "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U. S. C. § 2 is the aiding or abetting statute.

[3] 18 U. S. C. § 201 (g) provides: "Whoever, being a public official, former public official, or person selected to be a public official, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself for or because of any official act performed or to be performed by him . . . [shall be guilty of an offense]."

it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.

"It is the opinion of this Court that the immunity under the Speech and [*sic*] Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution for alleged bribery to perform a legislative act.

"I will, therefore, dismiss the odd counts of the indictment, 1, 3, 5, 7, and 9, as they apply to Senator Brewster."

The United States filed a direct appeal to this Court, pursuant to 18 U. S. C. § 3731 (Supp. V, 1970).[4] We postponed consideration of jurisdiction until hearing the case on the merits. 401 U. S. 935 (1971).

I

The United States asserts that this Court has jurisdiction under 18 U. S. C. § 3731 (Supp. V, 1970) to review the District Court's dismissal of the indictment

[4] 18 U. S. C. § 3731 (Supp. V, 1970) provides:

"An appeal may be taken by and on behalf of the United States from the district court direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

The statute has since been amended to eliminate the direct appeal provision on which the United States relies. 18 U. S. C. § 3731. This appeal, however, was perfected under the old statute.

against appellee. Specifically, the United States urges that the District Court decision was either "a decision or judgment setting aside, or dismissing [an] indictment . . . or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment . . . is founded" or a "decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy." If the District Court decision is correctly characterized by either of those descriptions, this Court has jurisdiction under the statute to hear the United States' appeal.

In *United States* v. *Knox*, 396 U. S. 77 (1969), we considered a direct appeal by the United States from the dismissal of an indictment that charged the appellee in that case with violating 18 U. S. C. § 1001, a general criminal provision punishing fraudulent statements made to any federal agency. The appellee, Knox, had been accused of willfully understating the number of employees accepting wagers on his behalf when he filed a form which persons engaged in the business of accepting wagers were required by law to file. The District Court dismissed the counts charging violations of § 1001 on the ground that the appellee could not be prosecuted for failure to answer the wagering form correctly since his Fifth Amendment privilege against self-incrimination prevented prosecution for failure to file the form in any respect. We found jurisdiction under § 3731 to hear the appeal in *Knox* on the theory that the District Court had passed on the validity of the statute on which the indictment rested, 396 U. S. at 79 n. 2. The District Court in that case held that "§ 1001, as applied to this class of cases, is constitutionally invalid."

The counts of the indictment involved in the instant case were based on 18 U. S. C. § 201, a bribery statute. Section 201 applies to "public officials," and that term is defined explicitly to include Members of Congress, as well as other employees and officers of the United

States. Subsections (c)(1) and (g) prohibit the accepting of a bribe in return for being influenced in or performing an official act. The ruling of the District Court here was that "the Speech or Debate Clause of the Constitution, particularly in view of the interpretation given . . . in *Johnson*, shields Senator Brewster . . . from any prosecution for alleged bribery to perform a legislative act." Since § 201 applies only to bribery for the performance of official acts, the District Court's ruling is that, as applied to Members of Congress, § 201 is constitutionally invalid.

Appellee argues that the action of the District Court was not "a decision or judgment setting aside, or dismissing" the indictment, but was instead a summary judgment on the merits. Appellee also argues that the District Court did not rule that § 201 could never be constitutionally applied to a Member of Congress, but that "based on the facts of this case" the statute could not be constitutionally applied. Under *United States* v. *Sisson*, 399 U. S. 267 (1970), an appeal does not lie from a decision that rests, not upon the sufficiency of the indictment alone, but upon extraneous facts. If an indictment is dismissed as a result of a stipulated fact or the showing of evidentiary facts outside the indictment, which facts would constitute a defense on the merits at trial, no appeal is available. See *United States* v. *Findley*, 439 F. 2d 970 (CA1 1971). Appellee claims that the District Court relied on factual matter other than facts alleged in the indictment.

An examination of the record, however, discloses that, with the exception of a letter in which the United States briefly outlined the theory of its case against appellee, there were no "facts" on which the District Court could act other than those recited in the indictment. Appellee contends that the statement "based on the facts of this case," used by the District Judge in announcing his decision, shows reliance on the Government's outline

of its case. We read the District Judge's reference to "facts," in context, as a reference to the facts alleged in the indictment and his ruling as holding that Members of Congress are totally immune from prosecution for accepting bribes for the performance of official, *i. e.*, legislative, acts by virtue of the Speech or Debate Clause. Under that interpretation of § 201, it cannot be applied to a Member of Congress who accepts bribes that relate in any way to his office. We conclude, therefore, that the District Court was relying only on facts alleged in the indictment and that the dismissal of the indictment was based on a determination that the statute on which the indictment was drawn was invalid under the Speech or Debate Clause. As a consequence, this Court has jurisdiction to hear the appeal.

II

The immunities of the Speech or Debate Clause were not written into the Constitution simply for the personal or private benefit of Members of Congress, but to protect the integrity of the legislative process by insuring the independence of individual legislators. The genesis of the Clause at common law is well known. In his opinion for the Court in *United States v. Johnson*, 383 U. S. 169 (1966), Mr. Justice Harlan canvassed the history of the Clause and concluded that it

> "was the culmination of a long struggle for parliamentary supremacy. Behind these simple phrases lies a history of conflict between the Commons and the Tudor and Stuart monarchs during which successive monarchs utilized the criminal and civil law to suppress and intimidate critical legislators. Since the Glorious Revolution in Britain, and throughout United States history, the privilege has been recognized as an important protection of the

independence and integrity of the legislature." *Id.*, at 178 (footnote omitted).

Although the Speech or Debate Clause's historic roots are in English history, it must be interpreted in light of the American experience and in the context of the American constitutional scheme of government rather than the English parliamentary system. We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.[5] Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government.

It does not undermine the validity of the Framers' concern for the independence of the legislative branch to acknowledge that our history does not reflect a catalog of abuses at the hands of the Executive that gave rise to the privilege in England. There is nothing in our history, for example, comparable to the imprisonment of a Member of Parliament in the Tower without a hearing and, owing to the subservience of some royal judges to the Seventeenth and Eighteenth Century English Kings, without meaningful recourse to a writ of habeas corpus.[6] In fact, on only one previous occasion has this Court ever interpreted the Speech or Debate Clause

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[5] Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 15 (1968); Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 337–338 (1965).

[6] See C. Wittke, The History of English Parliamentary Privilege, 23–32 (1921).

in the context of a criminal charge against a Member of Congress.

(a) In *United States* v. *Johnson*, *supra*, the Court reviewed the conviction of a former Representative on seven counts of violating the federal conflict of interest statute, 18 U. S. C. § 281 (1964), and on one count of conspiracy to defraud the United States, 18 U. S. C. § 371 (1964). The Court of Appeals had set aside the conviction on the count for conspiracy to defraud as violating the Speech or Debate Clause. Mr. Justice Harlan, speaking for the Court, 383 U. S., at 183, cited the oft-quoted passage of Mr. Justice Lush in *Ex parte Wason*, LR 4 Q. B. 573 (1869):

> "I am clearly of the opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings *with respect to anything they may do or say in the House*." *Id.*, at 577 (emphasis added).

In *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), the first case in which this Court interpreted the Speech or Debate Clause, the Court expressed a similar view of the ambit of the American privilege. There the Court said the Clause is to be read broadly to include anything "generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204. This statement, too, was cited with approval in *Johnson*, 383 U. S., at 179. Our conclusion in *Johnson* was that the privilege protected members from inquiry into legislative acts or the motivation for actual performance of legislative acts. *Id.*, at 185.

In applying the Speech or Debate Clause, the Court focused on the specific facts of the *Johnson* prosecution. The conspiracy to defraud count alleged an

agreement among Representative Johnson and three co-defendants to obtain the dismissal of pending indictments against officials of savings and loan institutions. For these services, which included a speech made by Johnson on the House floor, the Government claimed Johnson was paid a bribe. At trial, the Government questioned Johnson extensively, relative to the conspiracy to defraud count, concerning the authorship of the speech, the factual basis for certain statements made in the speech, and his motives for giving the speech. The Court held that the use of evidence of a speech to support a count under a broad conspiracy statute was prohibited by the Speech or Debate Clause. The Government was, therefore, precluded from prosecuting the conspiracy count on retrial, insofar as it depended on inquiries into speeches made in the House.

It is important to note the very narrow scope of the Court's holding in *Johnson:*

> "We hold that a prosecution under a general criminal statute dependent on such inquiries [into the speech or its preparation] necessarily contravenes the speech or Debate Clause. We emphasize that our holding is limited to prosecutions involving circumstances such as those presented in the case before us." 383 U. S., at 184–185.

The opinion specifically left open the question of a prosecution, which though possibly entailing some reference to legislative acts, is founded upon a "narrowly drawn" statute passed by Congress in the exercise of its power to regulate its Members' conduct. Of more relevance to this case, the Court in *Johnson* emphasized that its decision did not affect a prosecution which, though founded on a criminal statute of general application, "does not draw in question the legislative acts of the defendant member of Congress or his motives

for performing them." *Id.*, at 185. The Court did not question the power of the United States to try Johnson on the conflict of interest counts, and it authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated.[7]

Three members of the Court would have affirmed Johnson's conviction. Chief Justice Warren, joined by MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN, concurring in part and dissenting in part, stated:

> "After reading the record, it is my conclusion that the Court of Appeals erred in determining that the evidence concerning the speech infected the jury's judgment on the [conflict of interest] counts. The evidence amply supports the prosecution's theory and the jury's verdict on these counts—that the respondent received over $20,000 for attempting to have the Justice Department dismiss an indictment against his [present] co-conspirators without disclosing his role in the enterprise. This is the classic example of a violation of § 281 by a Member of the Congress. . . . The arguments of government counsel and the court's instructions separating the conspiracy from the substantive counts seem unimpeachable. The speech was a minor part of the prosecution. There was nothing in it to inflame the jury, and the respondent pointed with pride to it as evidence of his vigilance in protecting the financial institutions of his State. The record further reveals that the trial participants were well aware that a finding of criminality on one count did not authorize sim-

[7] On remand, the District Court dismissed the conspiracy count without objection from the Government. Johnson was then found guilty on the remaining counts, and his conviction was affirmed *United States* v. *Johnson*, 419 F. 2d 56 (CA4 1969), cert. denied, 397 U. S. 1010 (1970).

ilar conclusions as to other counts, and I believe that this salutary principle was conscientiously followed. Therefore, I would affirm the convictions on the substantive counts." [Footnote omitted.]

Johnson thus stands as a unanimous holding that a Member of Congress may be prosecuted under a criminal statute provided that the Government's case does not rely on legislative acts or the motivation for legislative acts. A legislative act has consistently been defined as an act generally done in Congress in relation to the business before it. In sum, the Speech or Debate Clause prohibits inquiry only into those things generally said or done in the House in the performance of official duties and the motivation for those acts.

It is well known, of course, that Members of the Congress engage in many activities other than the purely legislative activities protected by the Speech and Debate Clause. These include a wide range of legitimate "errands" performed for constituents, the making of appointments with government agencies, assistance in securing government contracts, preparing so-called "news letters" to constituents, news releases, speeches delivered outside the Congress. The range of these related activities has grown over the years. They are performed in part because they have come to be expected by constituents and because they are a means of developing continuing support for future elections. Although these are entirely legitimate activities, they are political in nature rather than legislative, in the sense that term has been used by the Court in prior cases. But it has never been seriously contended that these political matters, however appropriate, have the protection afforded by the Speech or Debate Clause. Careful examination of the decided cases reveals that the Court has regarded the protection as reaching only those things "generally done in a

session of the House by one of its members in relation to the business before it," *Kilbourn* v. *Thompson*, *supra*, at 204, or things "said or done by him as a representative, in the exercise of the functions of that office," *Coffin* v. *Coffin*, 4 Mass. 1, 27 (1808).

(b) Appellee argues, however, that in *Johnson* we expressed a broader test for the coverage of the Speech or Debate Clause. It is urged that we held that the Clause protected from Executive or Judicial inquiry all conduct "related to the due functioning of the legislative process." It is true that the quoted words appear in the *Johnson* opinion, but appellee takes them out of context; in context they reflect a quite different meaning from that now urged. Although the indictment against Johnson contained eight counts, only one count was challenged before this Court as in violation of the Speech or Debate Clause. The other seven counts concerned Johnson's attempts to influence members of the Justice Department to dismiss pending prosecutions. In explaining why those counts were not before the Court, Mr. Justice Harlan wrote:

> "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise *related to the due functioning of the legislative process.* It is the application of this broad conspiracy statute to an improperly motivated speech that raises the constitutional problem with which we deal." 383 U. S., at 172. (Emphasis added; footnotes omitted.)

In stating that those things "in no wise related to the due functioning of the legislative process" were *not* covered by the privilege, the Court did not in any sense imply as a corrollary that everything that "related" to the

office of a member was shielded by the Clause. Quite the contrary, in *Johnson* we held, citing *Kilbourn* v. *Thompson*, that only acts generally done in the course of the process of enacting legislation were protected.

Nor can we give *Kilbourn* a more expansive interpretation. In citing with approval, 103 U. S., at 203, the language of Chief Justice Parsons of the Supreme Judicial Court of Massachusetts in *Coffin* v. *Coffin*, 4 Mass. 1 (1808), the *Kilbourn* Court gave no thought to enlarging "legislative acts" to include illicit conduct outside the House. The *Coffin* language is:

> "[The Massachusetts legislative privilege] ought not to be construed strictly, but liberally that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office. And I would define the article as securing to ~~every member exemption from prosecution~~ *for every thing said or done by him, as a representative, in the exercise of the functions of that office*, without inquiring, whether the exercise was regular according to the rules of the House, or irregular and against their rules. I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege, when not within the walls of the representatives' chamber." *Id.*, at 27 (emphasis added).

It is suggested that in citing these words, which were also quoted with approval in *Tenney* v. *Brandhove*, 341 U. S. 367, 373–374 (1951), the Court was interpreting the sweep of the Speech or Debate Clause to be broader than *Johnson* seemed to indicate or than we today hold. Emphasis is placed on the statement that "there are

cases in which [a Member] is entitled to this privilege when not within the walls of the representatives' chamber." But the context of *Coffin* v. *Coffin* indicates that in this passage Chief Justice Parsons was referring only to legislative acts, such as committee meetings, which take place outside the physical confines of the legislative chamber. In another passage, the meaning is clarified:

> "If a member . . . be out of the chamber, sitting in committee, executing the commission of the house, it appears to me that such member is within the reason of the article and ought to be considered within the privilege. The body of which he is a member, is in session, and he, as a member of that body, is in fact discharging the duties of his office. He ought, therefore, to be protected from civil or criminal prosecutions for every thing said or done by him in the exercise of his functions as a representative, in committee, either in debating, in assenting to, or in draughting a report." 4 Mass., at 28.

In no case has this Court ever treated the Clause as protecting all conduct *relating* to the legislative process.[8]

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[8] It is especially important to note that in *Coffin* v. *Coffin*, the court concluded that the defendant was not executing the duties of his office when he allegedly defamed the plaintiff and was hence not entitled to the claim of privilege.

[9] The "concession" MR. JUSTICE BRENNAN seeks to attribute to the Government lawyer who argued the case in the District Court reveals no more than the failure of the arguments in that court to focus on the distinction between true legislative acts and the myriad related political functions of a Member of Congress. The "concession" came in response to a question which clearly revealed that the District Court treated as protected all acts "related" to the office rather than limiting the protection to what "is said or done by him as a representative in the exercise of the functions of that office."

In every case thus far before this Court, the Speech or Debate Clause has been limited to an act which was clearly a part of the legislative process—the *due* functioning of the process.[10] Appellee's contention for a broader interpretation of the privilege draws essentially on the flavor of the rhetoric and the sweep of the language used by courts, not on the precise words used in any prior case, and surely not on the sense of those cases, fairly read.

(c) We would not think it sound or wise, simply out of an abundance of caution to doubly insure legislative independence, to extend the privilege beyond its intended scope, its literal language, and its history, to include all things in any way related to the legislative process. Given such a sweeping reading, we have no doubt that there are few activities in which a legislator engages that he would be unable somehow to "relate" to the legislative process. Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but no more than the statutes we apply, was its purpose to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy

[10] See *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881) (voting for a resolution); *Tenney* v. *Brandehove*, 341 U. S. 367 (1951) (harassment of witness by state legislator during a legislative hearing; not a Speech or Debate Clause case); *United States* v. *Johnson*, 383 U. S. 169 (1966) (making a speech on House floor); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967) (subpoenaing records for committee hearing); *Powell* v. *McCormack*, 395 U. S. 486 (1969) (voting for a resolution).

In *Coffin* v. *Coffin*, 4 Mass. 1 (1808), the state equivalent of the Speech or Debate Clause was held to be inapplicable to a legislator who was acting outside of his official duties.

others with impunity, but that was conscious choice of the Framers.[11]

The history of the privilege is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

> "The practice of granting the privilege of freedom from arrest and molestation to members' servants in time became a serious menace to individual liberty and to public order, and a form of protection by which offenders often tried—and they were often successful—to escape the penalties which their offenses deserved, and which the ordinary courts would not have hesitated to inflict. Indeed the sale of 'protections' at one time proved a source of income to unscrupulous members and those 'parliamentary indulgences' were on several occasions obtainable at a fixed market price." C. Wittke, The History of English Parliamentary Privilege, 39 (1921).

The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond

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[11] "To this construction of the article it is objected, that a private citizen may have his character basely defamed, without any pecuniary recompense or satisfaction. The truth of the objection is admitted. . . . The injury to the reputation of a private citizen is of less importance to the commonwealth, than the free and unreserved exercise of the duties of a representative, unawed by the fear of legal prosecutions." *Coffin* v. *Coffin*, 4 Mass. 1, 28 (1808).

See *Cochran* v. *Couzens*, 42 F. 2d 783 (CADC), cert. denied, 282 U. S. 874 (1930) (defamatory words uttered on Senate floor could not be basis of slander action).

what is necessary to preserve the integrity of the legislative process. Moreover, unlike England with no formal, written constitutional limitations on the monarch, we defined limits on the co-ordinate branches, providing other checks to protect against abuses of the kind experienced in that country.

It is also suggested that even if we interpreted the Clause broadly so as to exempt from inquiry all matters having any relationship to the legislative process, misconduct of Members would not necessarily go unpunished because each House is empowered to discipline its Members. Article I, § 5, does indeed empower each House to "determine the rules of its Proceedings, punish its Members for disorderly behavior, and, with the concurrence of two thirds, expel a Member," but Congress is ill-equipped to investigate, try, and punish its Members for a wide range of behavior that is loosely and incidentally related to the legislative process. In this sense the English analogy on which the dissents place much emphasis, and the reliance on *Ex parte Wason*, L. R. 4 Q. B. 573 (1869), are inapt. Parliament is itself "The High Court of Parliament"—the highest court in the land—and its judicial tradition better equips it for judicial tasks.

> "It is by no means an exaggeration to say that [the judicial characteristics of Parliament] colored and influenced some of the great struggles over legislative privilege in and out of Parliament to the very close of the nineteenth century. It is not altogether certain whether they have been entirely forgotten even now. Nowhere has the theory that Parliament is a court—the highest court of the realm, often acting in a judicial capacity and in a judicial manner—persisted longer than in the history of privilege of Parliament." C. Wittke, The History of English Parliamentary Privilege, 14 (1921).

The very fact of the supremacy of Parliament as England's highest tribunal explains the long tradition precluding trial for official misconduct of a member in any other and lesser tribunal.

In Australia and Canada, "where provision for legislative free speech or debate exists but where the legislature may not claim a tradition as the highest court of the realm, courts have held that the privilege does not bar the criminal prosecution of legislators for bribery." Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 338 (1965) (footnote omitted). Congress has shown little inclination to exert itself in this area.[12] Moreover, if Congress did lay aside its normal activities and take on itself the responsibility to police and prosecute the myriad activities of its Members related to but not directly a part of the legislative function, the independence of individual Members might actually be impaired.

The process of disciplining a Member in the Congress is not without countervailing risks of abuse since it is not surrounded with the panoply of protective shields that are present in a criminal case. An accused Member is judged by no specifically articulated standards[13] and is at the mercy of an almost unbridled discretion of the charging body that functions at once as accuser, prosecutor, judge, and jury from whose decision there is no established right of review.

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[12] See Thomas, Freedom of Debate: Protector of the People or Haven for the Criminal?, 3 The Harvard Rev. 74, 80–81 (No. 3, 1965); Note, The Bribed Congressman's Immunity from Prosecution, 75 Yale L. J. 335, 349 n. 84 (1965); Oppenheim, Congressional Free Speech, 8 Loyola L. Rev. 1, 27–28 (1955–1956).

[13] See, *e. g.*, *In re Chapman*, 166 U. S. 661, 669–670 (1897):

"The right to expel extends to all cases where the offense is such as in the judgment of the Senate is inconsistent with the trust and duty of a member."

In short a Member would be compelled to defend in what would be comparable to a criminal prosecution without the safeguards provided by the Constitution. Moreover, it would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment.[14] Strong arguments can be made that trials conducted in a Congress with an entrenched majority from one political party could result in far greater harassment than a conventional criminal trial with the wide range of procedural protections for the accused, including indictment by grand jury, trial by jury under strict standards of proof with fixed rules of evidence, and extensive appellate review.

Finally, the jurisdiction of Congress to punish its Members is not all-embracing. For instance, it is unclear to what extent Congress would have jurisdiction over a case such as this in which the alleged illegal activity occurred outside the chamber, while the appellee was a Member, but was undiscovered or not brought before a grand jury until after he left office.[15]

The sweeping claims of appellee would render Members of Congress virtually immune from a wide range

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[14] See the account of the impeachment of President Andrew Johnson in J. Kennedy, Profiles in Courage, 126–151 (1955). See also the account of the impeachment of Justice Samuel Chase in 3 A. Beveridge, Life of Marshall, at 169–220 (1919).

[15] "English Parliaments have historically reserved to themselves and still retain the sole and exclusive right to punish their members for the acceptance of a bribe in the discharge of their office. No member of Parliament may be tried for such an offense in any court of the land." Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 15–16 (1968). That this is obviously not the case in this country is implicit in the remand of Representative Johnson to be retried on bribery charges.

of crimes simply because the acts in question were peripherally related to their holding office. Such claims are inconsistent with the reading this Court has given not only to the Speech or Debate Clause, but also to the other legislative privileges embodied in Art. I, § 6. The very sentence in which the Speech or Debate Clause appears provides that Members "shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses. . . ." In *Williamson* v. *United States*, 207 U. S. 425 (1908), this Court rejected a claim, made by a Member convicted of subornation of perjury in proceedings for the purchase of public lands, that he could not be arrested, convicted, or imprisoned for any crime that was not treason, felony, or breach of the peace in the modern sense, *i. e.*, disturbing the peace. Mr. Justice Edward Douglass White noted that when the Constitution was written the term "Breach of the Peace" did not mean, as it came to mean later, a misdemeanor such as disorderly conduct but had a different 18th century usage, since it derived from breaching the King's peace and thus embraced the whole range of crimes at common law. Quoting Lord Mansfield, he noted, with respect to the claim of parliamentary privilege, "The laws of this country allow no place or employment as a sanctuary for crime . . . ." *Id.*, at 439.

The subsequent case of *Long* v. *Ansell*, 293 U. S. 76 (1934), held that a Member's immunity from arrest in civil cases did not extend to civil process. Mr. Justice Brandeis wrote for the Court:

> "Clause 1 [of Article I, § 6] defines the extent of the immunity. Its language is exact and leaves no room for construction which would extend the privilege beyond the terms of the grant." *Id.*, at 82.

We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin. It can hardly be thought that the Speech or Debate Clause totally protects what the sentence preceding it has plainly left open to prosecution, *i. e.*, all criminal acts.

(d) MR. JUSTICE WHITE suggests that permitting the Executive to initiate the prosecution of a Member of Congress for the specific crime of bribery is subject to serious potential abuse that might endanger the independence of the legislature—for example, a campaign contribution might be twisted by a ruthless prosecutor into a bribery indictment. But, as we have just noted, the Executive is not alone in possessing power potentially subject to abuse; such possibilities are inherent in a system of government which delegates to each of the three branches separate and independent powers.[16] In the Federalist

[16] The potential for harassment by an unscrupulous member of the Executive Branch may exist, but this country has no tradition of absolute congressional immunity from criminal prosecution. See *United States* v. *Quinn*, 141 F. Supp. 622 (SDNY 1956) (motion for acquittal granted because the defendant Member of Congress was unaware of receipt of fees by his law firm); *Burton* v. *United States*, 202 U. S. 344 (1906) (Senator convicted for accepting compensation to intervene before Post Office Department); *United States* v. *Dietrich*, 126 F. 671 (CCD Neb. 1904) (Senator-elect's accepting payment to procure office for another not covered by statute); *May* v. *United States*, 175 F. 2d 904 (CADC), cert. denied, 338 U. S. 830 (1949) (Congressman convicted of receiving compensation for services before an agency); *United States* v. *Bramblett*, 348 U. S. 503 (1955) (Congressman convicted of defrauding government agency). *Bramblett* concerned a Congressman's misuse of office funds via a "kick-back" scheme, which is surely "related" to the legislative office. A strategically timed indictment could indeed cause serious harm to a Congressman. Representative Johnson, for example, was indicted while campaigning for re-election, and arguably his indictment contributed to his defeat. On the other hand, there is the

No. 73. Hamilton expressed concern over the possible hazards that confronted an Executive dependent on Congress for financial support.

> "The Legislature, with a discretionary power over the salary and emoluments of the Chief Magistrate, could render him as obsequious to their will as they might think proper to make him. They might in most cases either reduce him by famine, or tempt him by largesses, to surrender at discretion, his judgment to their inclinations."

Yet Hamilton's "parade of horribles" finds little real support in history. The check-and-balance mechanism, buttressed by unfettered debate in an open society with a free press has not encouraged abuses of power or tolerated them long when they arose. This may be explained in part because the third branch has intervened with neutral authority. See, *e. g., United States* v. *Lovett*, 328 U. S. 303 (1946). The system of divided powers was expressly designed to check the abuses England experienced in the 16th to the 18th century.

Probably of more importance is the public reaction engendered by any attempt of one branch to dominate

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classic case of Mayor Curley who was reelected while under indictment. See 4 New Catholic Encyclopedia, at 541 (1967). Moreover, we should not overlook the barriers a prosecutor, attempting to bring such a case, must face. First, he must persuade a grand jury to indict, and we are not prepared to assume that grand juries will act against a Member without solid evidence. Thereafter, he must convince a petit jury beyond a reasonable doubt with the presumption of innocence favoring the accused. A prosecutor who fails to clear one of these hurdles faces serious practical consequences when the defendant is a Congressman. The Legislative Branch is not without weapons of its own and would no doubt use them if it thought the Executive were unjustly harassing one of its members. Perhaps more important is the omnipresence of the news media whose traditional function and competitive inclination affords no immunities to reckless or irresponsible official misconduct.

or harass another. Even traditional political attempts to establish dominance have met with little success owing to contrary popular sentiment. Attempts to "purge" uncooperative legislators, for example, have not been notably successful. We are not cited to any cases in which the bribery statutes, which have been applicable to Members of Congress for over 100 years,[17] have been abused by the Executive Branch. When a powerful Executive sought to make the Judicial Branch more responsive to the combined will of the Executive and Legislative Branches, it was the Congress itself that checked the effort to enlarge the Court. 2 M. Pusey, Charles Evans Hughes, c. 70 (1951).

We would be closing our eyes to the realities of the American political system if we failed to acknowledge that many non-legislative activities are an established and accepted part of the role of a Member, and are indeed "related" to the legislative process. But if the Executive may prosecute a Member's attempt, as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe. We therefore see no substantial increase in the power of the Executive and Judicial Branches over the Legislative Branch resulting from our holding today. If we underestimate the potential for harassment, the Congress, of course, is free to exempt its Members from the ambit of federal bribery laws, but it has deliberately allowed the instant statute to remain on the books for over a century.

We do not discount entirely the possibility that an abuse might occur, but this possibility, which we consider remote, must be balanced against the potential danger flowing from either the absence of a

[17] The first bribery statute applicable to Congressmen was enacted in 1853. Act of Feb. 26, 1853, c. 81, § 6, 10 Stat. 171.

bribery statute applicable to Members of Congress or a holding that the statute violates the Constitution. As we noted at the outset, the purpose of the Speech or Debate Clause is to protect the individual legislator, not simply for his own sake, but to preserve the independence and thereby the integrity of the legislative process. But financial abuses, by way of bribes, perhaps even more than Executive power, would gravely undermine legislative integrity and defeat the right of the public to honest representation. Depriving the Executive of the power to investigate and prosecute and the Judiciary of the power to punish bribery of Members of Congress is unlikely to enhance legislative independence. Given the disinclination and limitations of each House to police these matters, it is understandable that both Houses deliberately delegated this function to the courts, as they did with the power to punish persons committing contempts of Congress. 2 U. S. C. § 192.

It is beyond doubt that the Speech or Debate Clause protects against inquiry into acts which occur in the regular course of the legislative process and into the motivation for those acts. So expressed, the privilege is broad enough to insure the historic independence of the Legislative Branch, essential to our separation of powers, but narrow enough to guard against the excesses of those who would corrupt the process by corrupting its Members. We turn next to determine whether the subject of this criminal inquiry is within the scope of the privilege.

III

An examination of the indictment brought against appellee and the statutes on which it is founded reveals that no inquiry into legislative acts or motivation for legislative acts is necessary for the Government to make out a prima facie case. Four of the five counts

charge that appellee "corruptly asked, solicited, sought, accepted, received, and agreed to receive" money "in return for being influenced . . . in respect to his action, vote, and decision on postage rate legislation, which might at any time be pending before him in his official capacity." This is said to be a violation of 18 U. S. C. § 201 (c)(1), which provides that a Member who "corruptly asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value . . . in return for . . . being influenced in his performance of any official act" is guilty of an offense.

The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.

Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. It is not, by any conceivable interpretation, an act performed as a part of or even incidental to the role of a legislator. It is not an "act resulting from the nature and execution of the office." Nor is it "a thing said or done by him as a representative in the exercise of the functions of the office," 4 Mass., at 27. Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment. When a bribe is taken, it does not matter whether the promise for which the bribe was given was for the performance of a legislative act as here or, as in *Johnson*, for use of a Congressman's influence with the Executive Branch. And an inquiry into the purpose of a bribe "does not

draw into question the legislative acts of the defendant Member of Congress or his motives for performing them." 383 U. S. at 185.

Nor does it matter if the Member defaults on his illegal bargain. To make a prima facie case under this indictment, the Government need not show any act of appellee subsequent to the corrupt promise for payment, for it is *taking* the bribe, not performance of the illicit compact, that is a criminal act. If, for example, there were undisputed evidence that a Member took a bribe in exchange for an agreement to vote for a given bill and if there were also undisputed evidence that he, in fact, voted against the bill, can it be thought that this alters the nature of the bribery or removes it from the area of wrongdoing the Congress sought to make a crime?

Another count of the indictment against appellee alleges that he "asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive" money "for and because of official acts performed by him in respect to his action, vote and decision on postage rate legislation which had been pending before him in his official capacity." This count is founded on 18 U. S. C. § 201 (g), which provides that a Member of Congress who "asks, demands, exacts, solicits, seeks, accepts, receives, or agrees to receive anything of value for himself or because of any official act performed or to be performed by him" is guilty of an offense. Although the indictment alleges that the bribe was given for an act that was actually performed, it is, once again, unnecessary to inquire into the act or its motivation. To sustain a conviction it is necessary to show that appellee solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation for an official act. Inquiry into the legislative performance itself is not necessary; evidence of the Member's knowledge of the alleged briber's illicit reasons for

paying the money is sufficient to carry the case to the jury.

MR. JUSTICE WHITE rests heavily on the fact that the indictment charges the offense as being in part linked to Brewster's "action, vote and decision on postal rate legislation." This is true, of course, but our holding in *Johnson* precludes any showing of how he acted, voted or decided. The dissenting position stands on the fragile proposition that it "would take the Government at its word" with respect to wanting to prove what we all agree are protected acts which cannot be shown in evidence. Perhaps the Government would make a more appealing case if it could do so, but here, as in that case, evidence of acts protected by the Clause is inadmissible. The Government, as we have noted, need not prove any specific act, speech, debate, or decision to establish a violation of the statute under which respondent was indicted. To accept the arguments of the dissent would be to retreat from the Court's position in *Johnson* that a Member may be convicted if no showing of legislative act is required.

MR. JUSTICE BRENNAN suggests that inquiry into the alleged bribe is inquiry into the motivation for a legislative act, and it is urged that this very inquiry was condemned as impermissible in *Johnson*. That argument misconstrues the concept of motivation for legislative acts. The Speech or Debate Clause does not prohibit inquiry into illegal conduct simply because it has some nexus to legislative functions. In *Johnson*, the Court held that on remand, Johnson could be retried on the conspiracy to defraud count, so long as evidence concerning his speech on the House floor was not admitted. The Court's opinion plainly implies that had the Government chosen to retry Johnson on that count, he could not have obtained immunity from prosecution by asserting that the matter being inquired into was related to the motivation for his House speech. See n. 7, *supra*.

The only reasonable reading of the Clause, consistent with its history and purpose, is that it does not prohibit inquiry into activities which are casually or incidentally related to legislative affairs but not a part of the legislative process itself. Under this indictment and these statutes no such proof is needed.

We hold that under this statute and this indictment, prosecution of appellee is not prohibited by the Speech or Debate Clause.[1] Accordingly the judgment of the District Court is reversed and the case is remanded for further proceedings consistent with this opinion.

[1] In reversing the District Court's ruling that a Member of Congress may not be constitutionally tried for a violation of the federal bribery statutes, we express no views on the question left open in *Johnson* as to the constitutionality of an inquiry that probes into legislative acts or the motivation for legislative acts if Congress specifically authorizes such in a narrowly drawn statute. Should such an inquiry be made and should a conviction be sustained, then we would face the question whether inquiry into legislative acts and motivation is permissible under such a narrowly drawn statute.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant,
v.
Daniel B. Brewster.

On Appeal from the United States District Court for the District of Columbia Circuit.

[June 29, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS joins, dissenting.

When this case first came before the Court, I had thought it presented a single, well-defined issue—that is, whether the Congress could authorize by a narrowly drawn statute the prosecution of a Senator or Representative for conduct otherwise immune from prosecution under the Speech or Debate Clause of the Constitution. Counts 1, 3, 5, and 7 of the indictment charged Senator Brewster with receiving $19,000 "in return for being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation which might at any time be pending before him in his official capacity [as a member of the Senate Post Office Committee]." Count 9 charged the Senator with receipt of another $5,000 for acts already performed by him with respect to his "action, vote, and decision" on that legislation. These charges, it seemed to me, fell within the clear prohibition of the Speech or Debate Clause as interpreted by decisions of this Court, particularly *United States* v. *Johnson*, 383 U. S. 169 (1966). For if the indictment did not call into question the "speeches or debates" of the Senator, it certainly laid open to scrutiny the motives for his legislative acts; and those motives, I had supposed, were no more subject to Executive and Judicial inquiry than the acts

themselves, unless, of course, the Congress could delegate such inquiry to the other branches.

That, apparently, was the Government's view of the case as well. At the hearing before the District Court the prosecutor was asked point blank whether "the indictment in any wise allege[d] that Brewster did anything not related to his purely legislative functions." The prosecutor responded:

> "We are not contending that what is being charged here, that is, the activity by Brewster, was anything other than a legislative act. We are not ducking the question; it is squarely presented. They are legislative acts. We are not going to quibble over that." App. 28.

The Government, in other words, did not challenge the applicability of the Clause to these charges, but argued only that its prohibitions could be avoided, "waived," as it were, through congressional authorization in the form of a narrowly drawn bribery statute. The District Court accepted the Government's reading of the indictment and held that the Senator could not be prosecuted for this conduct even under the allegedly narrow provisions of 18 U. S. C. § 201:

> "Gentlemen, based on the facts of this case, it is admitted by the Government that the five counts of the indictment which charge Senator Brewster relate to the acceptance of bribes in connection with the performance of a legislative function by a Senator of the United States.
>
> "It is the opinion of this Court that the immunity under the Speech and Debate Clause of the Constitution, particularly in view of the interpretation given that Clause by the Supreme Court in *Johnson*, shields Senator Brewster, constitutionally shields him from any prosecution

for alleged bribery to perform a legislative act." App. 33.

Furthermore, the Government's initial brief in this Court, doubtless reflecting its recognition that *Johnson* had rejected the analysis adopted by the Court today, did not argue that a prosecution for acceptance of a bribe in return for a promise to vote a certain way falls outside the prohibition of the Speech or Debate Clause. Rather, the Government's Brief conceded or at least assumed that such conduct does constitute "Speech or Debate," but urged that Congress may enact a statute, such as 18 U. S. C. § 201, providing for judicial trial of the alleged crime.

Given these admissions by the Government and the District Court's construction of the indictment, which settled doctrine makes binding on this Court, *United States* v. *Jones*, 345 U. S. 377, 378 (1953), the only issue properly before us was whether Congress is empowered to delegate to the Executive and Judicial Branches the trial of a member for conduct otherwise protected by the Clause. Today, however, the Court finds it unnecessary to reach that issue, for it finds that the indictment, though charging receipt of a bribe for legislative acts, entails "no inquiry into legislative acts or motivation for legislative acts," *ante*, at 24, and thus is not covered by the Clause. In doing so the Court permits the Government to recede from its firm admissions, it ignores the District Court's binding construction of the indictment, and—most important—it repudiates principles of legislative freedom developed over the past century in a line of cases culminating in *Johnson*. Those principles, which are vital to the right of the people to be represented by Congressmen of independence and integrity, deserve more than the hasty burial given them by the Court today. I must therefore dissent.

I

I would dispel at the outset any notion that Senator Brewster's asserted immunity strains the outer limits of the Clause. The Court writes at length in an effort to show that "Speech or Debate" does not cover "all conduct relating to the legislative process." *Ante*, at 14. Even assuming the validity of that conclusion, I fail to see its relevance to the instant case. Senator Brewster is not charged with conduct merely "relating to the legislative process," but with a crime whose proof calls into question the very motives behind his legislative acts. The indictment, therefore, lies not at the periphery but at the very center of the protection that this Court has said is provided a Congressman under the Clause.

Decisions of this Court dating as far back as 1881 have consistently refused to limit the concept of "legislative acts" to the "Speech or Debate" specifically mentioned in Art. I, § 6. In *Kilbourn* v. *Thompson*, 103 U. S. 168 (1881), the Court held that

> "[i]t would be a narrow view of the constitutional provision to limit it to words spoken in debate. The reason of the rule is as forcible in its application to written reports presented in that body by its committees, to resolutions offered, which, though in writing, must be reproduced in speech, and to the act of voting, whether it is done vocally or by passing between the tellers. In short, to things generally done in a session of the House by one of its members in relation to the business before it." *Id.*, at 204.

In reaching its conclusion, the Court adopted what was said by the Supreme Judicial Court of Massachusetts in *Coffin* v. *Coffin*, 4 Mass. 1 (1808), which *Kilbourn* held to be perhaps "the most authoritative case in this country on the construction of the provision in regard to freedom of debate in legislative bodies . . . ." *Ibid.*

Chief Justice Parsons, speaking for the Massachusetts court, expressed what *Kilbourn* and later decisions saw as a properly generous view of the legislative privilege:

> "These privileges are thus secured, not with the intention of protecting the members against prosecution for their own benefit, but to support the rights of the people, by enabling their representatives to execute the functions of their office without fear of prosecutions, civil or criminal. I therefore think that the article ought not to be construed strictly, but liberally, that the full design of it may be answered. I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate; but will extend it to the giving of a vote, to the making of a written report, and to every other act resulting from the nature and in the execution of the office; and I would define the article, as securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office; without enquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules. I do not confine the member to his place in the house; and I am satisfied that there are cases, in which he is entitled to this privilege, when not within the walls of the representatives' chamber." 4 Mass., at 27.

There can be no doubt, therefore, that Senator Brewster's vote on new postal rates constituted legislative activity within the meaning of the Clause. The Senator could not be prosecuted or called to answer for his vote in any Judicial or Executive proceeding. But the Senator's immunity, I submit, goes beyond the vote itself and precludes all extra-congressional scrutiny as to how and why he cast, or would have cast, his vote a certain way. In *Tenney* v. *Brandhove*, 341 U. S. 367,

(1951), the plaintiff charged that a state legislative hearing was being conducted not for a proper legislative purpose but solely as a means of harassing him. Nevertheless the Court held that no action would lie against the committee members under federal civil rights statutes. Mr. Justice Frankfurter stated:

> "The claim of an unworthy purpose does not destroy the privilege. Legislators are immune from deterrents to the uninhibited discharge of their legislative duty, not for their private indulgence but for the public good. One must not expect uncommon courage even in legislators. The privilege would be of little value if they could be subjected to the cost and inconvenience and distractions of a trial upon a conclusion of the pleader, or to the hazard of a judgment against them based upon a jury's speculation as to motives. The holding of this Court in *Fletcher* v. *Peck*, 6 Cranch 87, 130, that it was not consonant with our scheme of government for a court to inquire into the motives of legislators, has remained unquestioned . . . .
>
> ". . . In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." *Id.*, at 377-378.

Barring congressional power to authorize this prosecution, what has been said thus far would seem sufficient to require affirmance of the order of dismissal; for neither Senator Brewster's vote nor his motives for voting, however dishonorable, may be the subject of a civil or criminal proceeding outside the walls of the Senate. There

is nothing complicated about this conclusion. It follows simply and inescapably from prior decisions of this Court, *supra*, setting forth the most basic elements of legislative immunity. Yet the Court declines to apply those principles to this case, for it somehow finds that the Government can prove its case without referring to the Senator's official acts or motives. According to the Court, the Government can limit its proof on Counts 1, 3, 5, and 7 to evidence concerning Senator Brewster's "taking or agreeing to take money for a promise to act in a certain way," and need not show "that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise." *Ante*, at 25. Similarly, the Court finds that Count 9 can be proved merely by showing that the Senator solicited or received money "with knowledge that the donor was paying him compensation for an official act," without any inquiry "into the legislative performance itself." *Ante*, at 26. These evidentiary limitations are deemed sufficient to avoid the prohibitions of the Speech or Debate Clause.

With all respect, I think that the Court has adopted a wholly artificial view of the charges before us. The indictment alleges not the mere receipt of money, but the receipt of money in exchange for a Senator's vote and promise to vote in a certain way. Insofar as these charges bear on votes already cast, the Government cannot avoid proving the performance of the bargained-for acts, for it is the acts themselves, together with the motivating bribe, that form the basis of Count 9 of the indictment. Proof of "knowledge that the donor was paying . . . for an official act" may be enough for conviction under § 201 (g). But assuming it is, the Government still must demonstrate that the "official act" referred to was actually performed, for that is what the indictment charges. Count 9, in other words, calls

into question both the performance of official acts by the Senator and his reasons for voting as he did. Either inquiry violates the Speech or Debate Clause.

The counts charging only a corrupt promise to vote are equally repugnant to the clause. The Court may be correct that only receipt of the bribe, and not performance of the bargain, is needed to prove these counts. But proof of an agreement to be "influenced" in the performance of legislative acts is by definition an inquiry into their motives, whether or not the acts themselves or the circumstances surrounding them are questioned at trial. Furthermore, judicial inquiry into an alleged agreement of this kind carries with it the same dangers to legislative independence that are held to bar accountability for official conduct itself. As our Brother WHITE cogently states, *post*, at 6–7:

> "'Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote, whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain."

Thus, even if this were an issue of first impression, I would hold that this prosecution, being an extra-congressional inquiry into legislative acts and motives, is barred by the Speech or Debate Clause.

What is especially disturbing about the Court's result, however, is that this is not an issue of first impression, but one that was settled six years ago in *United States* v. *Johnson*, 383 U. S. 169 (1966). There a former Congressman was charged with violating the federal conflict-of-interest statute, 18 U. S. C. § 281, and of

conspiring to defraud the United States, 18 U. S. C. § 371, by accepting a bribe in exchange for his agreement to seek dismissal of federal indictments pending against officers of several savings and loan companies. Part of the alleged conspiracy was a speech delivered by Johnson on the floor of the House, favorable to loan companies generally. The Government relied on that speech at trial and questioned Johnson extensively about its contents, authorship, and his reasons for delivering it. The Court of Appeals set aside the conspiracy conviction, holding that the Speech or Debate Clause barred such a prosecution based on an allegedly corrupt promise to deliver a congressional speech. In appealing that decision the Government made the very same argument that appears to persuade the Court today:

> "[The rationale of the Clause] is applicable in suits based upon the *content* of a legislator's speech or action, where immunity is necessary to prevent impediments to the free discharge of his public duties. But it does not justify granting him immunity from prosecution for accepting or agreeing to accept money to make a speech in Congress. The latter case poses no threat which could reasonably cause a Congressman to restrain himself in his official speech, because no speech, as such, is being questioned. It is only the *antecedent conduct* of accepting or agreeing to accept the bribe which is attacked in such a prosecution. 'Whether the party taking the bribe lives up to his corrupt promise or not is immaterial. The agreement is the essence of the offense; when that is consummated, the offense is complete.' 3 Wharton, Criminal Law and Procedure, § 1383 (Anderson ed. 1957) . . . . Thus, if respondent, after accepting the bribe, had failed to carry out his bargain, he could still be prosecuted for the same offense charged here, but it could not

be argued that any speech was being 'questioned' in his prosecution. The fact that respondent fulfilled his bargain and delivered the corrupt speech should not render the entire course of conduct constitutionally protected." Brief for the United States in *United States* v. *Johnson*, at 10–11.

The *Johnson* opinion answered this argument in two places. After emphasizing that the prosecution at issue was "based upon an allegation that a member of Congress abused his position by conspiring to give a particular speech in return for remuneration from private interests," the Court stated, 383 U. S., at 180:

> "However reprehensible such conduct may be, we believe the Speech or Debate Clause extends at least so far as to prevent it from being made the basis of a criminal charge against a member of Congress of conspiracy to defraud the United States by impeding the due discharge of government functions. *The essence of such a charge in this context is that the Congressman's conduct was improperly motivated, and . . . that is precisely what the Speech or Debate Clause generally forecloses from executive and judicial inquiry.*" (Emphasis supplied.)

Again the Court stated, at 182–183:

> "The Government argues that the clause was meant to prevent only prosecutions based upon the 'content' of speech, such as libel actions, but not those founded on 'the antecedent unlawful conduct of accepting or agreeing to accept a bribe.' Brief of the United States, at 11. Although historically seditious libel was the most frequent instrument for intimidating legislators, this has never been the sole form of legal proceedings so employed, and the language of the Constitution is framed in the broadest terms."

Finally, any doubt that the *Johnson* Court rejected the argument put forward by the Government was dispelled by its citation of *Ex parte Wason*, 4 Q. B. 573 (1869). In that case a private citizen moved to require a magistrate to prosecute several members of the House of Lords for conspiring to prevent his petition from being heard on the floor. The court denied the motion, holding that "statements made by members of either House of Parliament in their places in the House . . . could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law." *Id.*, at 576 (Cockburn, C. J.). Mr. Justice Blackburn added, "I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offense." *Ibid.*

Johnson, then, can only be read as holding that a corrupt agreement to perform legislative acts, even if provable without reference to the acts themselves, may not be the subject of a general conspiracy prosecution. In the face of that holding and *Johnson*'s rejection of reasoning identical to its own, the Court finds support in the fact that *Johnson* "authorized a new trial on the conspiracy count, provided that all references to the making of the speech were eliminated." *Ante*, at 10. But the Court ignores the fact that, with the speech and its motives excluded from consideration, this new trial was for nothing more than a conspiracy to intervene before an Executive department, *i. e.*, the Justice Department. And such Executive intervention has never been considered legislative conduct entitled to the protection of the Speech or Debate Clause. See

infra, at 14. The Court cannot camouflage its departure from the holding of *Johnson* by referring to a collateral ruling having little relevance to the fundamental issues of legislative privilege involved in that case. I would follow *Johnson* and hold that Senator Brewster's alleged promise, like the Congressman's there, is immune from executive or judicial inquiry.

II

The only issue for me, then, is the one left open in *Johnson*—that is, the validity of a "prosecution which, though possibly entailing inquiry into legislative acts or motivations, is founded [not upon a general conspiracy statute but] upon a narrowly drawn statute passed by Congress in the exercise of its legislative power to regulate the conduct of its members." 383 U. S. at 185. Assuming that 18 U. S. C. § 201 is such a "narrowly drawn statute," I do not believe that it, any more than a general enactment, can serve as the instrument for holding a Congressman accountable for his legislative acts outside the confines of his own chamber. The Government offers several reasons why such a "waiver" of legislative immunity should be allowed. None of these, it seems to me, is sufficient to override the public's interest in legislative independence, secured to it by the principles of the Speech or Debate Clause.[1]

As a preliminary matter, the Government does not contend, nor can it, that no forum was provided in which Senator Brewster might have been punished if

[1] Although the Court does not reach this issue, it adopts many of the Government's arguments to show that the Speech or Debate Clause is or should be wholly inapplicable to this case. My disagreement with these contentions applies equally to their use by the Court in support of its position.

guilty. Article I, § 5, of the Constitution provides that ". . . Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member." This power has a broad reach, extending "to all cases where the offense is such as in the judgment of the [House or] Senate is inconsistent with the trust and duty of a member." *In re Chapman*, 166 U. S. 661, 669–670 (1897). *Chapman*, for example, concerned a Senate investigation of charges that Senate members had speculated in stocks of companies interested in a pending tariff bill. Similarly, the House of Representatives in 1873 censured two members for accepting stock to forestall a congressional inquiry into the Credit Mobilier. There are also many instances of imprisonment or expulsion by Parliament of members who accepted bribes.[2]

Though conceding that the Houses of Congress are empowered to punish their members under Art. I, § 5, the Government urges that Congress may also enact a statute, such as 18 U. S. C. § 201, providing for judicial enforcement of that power. In support of this position, the Government relies primarily on the following language from the opinion in *Burton v. United States*, 202 U. S. 344, 367 (1906):

> "While the framers of the Constitution intended that each Department should keep within its appointed sphere of public action, it was never contemplated that the authority of the Senate to admit to a seat in its body one who had been duly elected as a Senator, or its power to expel him after being admitted, should, in any degree, limit or restrict the authority of Congress to enact such statutes,

[2] See n. 4, *infra*, and accompanying text.

not forbidden by the Constitution, as the public interests required for carrying into effect the powers granted to it."

However, *Burton* was not a case that involved conduct protected by the Speech or Debate Clause. Senator Burton was prosecuted for accepting money to influence the Post Office Department in a mail fraud case in violation of Rev. Stat. 1782, 13 Stat. 123. That was nonlegislative conduct, and as we said in *Johnson*, *supra*, at 172, "No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process." Such a prosecution, as the quoted excerpt from *Burton* specifically said, is "not forbidden by the Constitution," but that holding has little relevance to a case, such as this one, involving legislative acts and motives.

The Government, however, cites additional considerations to support the authority of Congress to provide for judicial trials of corrupt members: the press of congressional business, the possibility of politically motivated judgments by fellow members, and the procedural safeguards of a judicial trial are all cited as reasons why Congress should be allowed to transfer the trial of a corrupt member from the Houses of Congress to the courts. Once again, these are arguments urged and found unpersuasive in *Johnson*. I find them no more persuasive now. I may assume as a general matter that the "Legislative Branch is not so well suited as politically independent judges and juries to the task of ruling upon the blameworthiness of, and levying appropriate punishment upon, specific persons." *United States* v. *Brown*, 381 U. S. 437, 445 (1965). Yet it does

not necessarily follow that prosecutors, judges, and juries are better equipped than legislators to make the kinds of political judgments required here. Senators and Congressmen are never entirely free of political pressures, whether from their own constituents or from special interest lobbies. Submission to these pressures, in the hope of political and financial support, or the fear of its withdrawal, is not uncommon, nor is it necessarily unethical.[3] The line between legitimate influence and outright bribe may be more a matter of emphasis than objective fact, and in the end may turn on the trier's view of what was proper in the context of the everyday realities and necessities of political office. Whatever the special competence of the judicial process in other areas, members of Congress themselves are likely to be in the better position to judge the issue of bribery relating to legislative acts. The observation of Mr. Justice Frankfurter bears repeating here: "Courts are not the place for such controversies. Self-discipline and

[3] Cf. Conflict of Interest and Federal Service, Association of the Bar of the City of New York 14–15 (1960):

"The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry—though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable, and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflict of interest in Congress runs afoul of the basic premises of American representative government."

the voters must be the ultimate reliance for discouraging or correcting such abuses." *Tenney* v. *Brandhove*, *supra*, at 378.

Nor is the member at the mercy of his colleagues, free to adjust as they wish his rights to due process and free expression. It is doubtful, for example, that the Congress could punish a member for the mere expression of unpopular views otherwise protected by the First Amendment. *See Bond* v. *Floyd*, 385 U. S. 116 (1966). And judicial review of the legislative inquiry is not completely foreclosed; the power of the House and Senate to discipline the conduct of members is not exempt from the "restraints imposed by or found in the implications of the Constitution." *Barry* v. *United States ex rel. Cunningham*, 279 U. S. 597, 614 (1929), quoted in *Powell* v. *McCormack*, 395 U. S. 486, 519 n. 40 (1969).

Finally, the Government relies on the history of the Clause to support a congressional power of delegation. While agreeing that the Speech or Debate Clause was a "culmination of a long struggle for parliamentary supremacy" and a reaction against the Crown's use of "criminal and civil law to suppress and intimidate critical legislators," *Johnson*, *supra*, at 178, the Government urges that this is not the whole story. It points out that while a large part of British history was taken up with Parliament's struggles to free itself from royal domination, the balance of power was not always ranged against it. Once Parliament succeeded in asserting rightful dominion over its members and the conduct of its business, Parliament sought to extend its reach into areas and for purposes that can only be labeled an abuse of legislative power. Aware of these abuses, the Framers, the Government submits, did not mean Congress to have exclusive power, but one which, by congressional delegation, might be shared with the Executive and Judicial Departments.

That the Parliamentary privilege was indeed abused is historical fact. By the close of the 17th century Parliament had succeeded in obtaining rights of free speech and debate as well as the power to punish offenses of its members contravening the good order and integrity of its processes. In 1694, five years after incorporation of the Speech or Debate Clause in the English Bill of Rights, Lord Falkland was found guilty in Commons of accepting a bribe of 2,000 pounds from the Crown, and was imprisoned during the pleasure of the House. The Speaker of the House of Commons, Sir John Trevor, was censured for bribery the following year.[1]

But Parliament was not content with mere control over its members' conduct. Independence brought an assertion of absolute power over the definition and reach of institutional privileges. "[T]he House of Commons and the House of Lords claimed absolute and plenary authority over their privileges. This was an independent body of law, described by Coke as *lex parliamenti*. Only Parliament could declare what those privileges were or what new privileges were occasioned, and only Parliament could judge what conduct constituted a breach of privilege." *Watkins* v. *United States*, 354 U. S. 178, 188 (1957). Thus, having established the basic privilege of its members to be free from civil arrest or punishment, the House extended the privilege to its members' servants, and punished trespass on the estates of its members, or theft of their or their servants' goods. The House went so far as to declare its members' servants to be outside the reach of the common law courts during the time that Par-

[1] Luce, Legislative Assemblies 401–402 (1924). Another notable instance was that of Robert Walpole, who in 1711 was expelled and imprisoned by the House on charges of corruption. Tasswell-Langmead, English Constitutional History 583–584 (11th ed., Plucknett, 1960).

liament was sitting. This led to the sale of "protections" providing that named persons were servants of a particular member and should be free from arrest, imprisonment, and molestation during the term of Parliament. These abuses in turn were brought to America. By 1662, for example, the Virginia House of Burgesses had succeeded in exempting not only its members, but their servants as well, from arrest and molestation.[6]

The Government is correct in pointing out that the Framers, aware of these abuses, were determined to guard against them. Madison stated that the "legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex." [7] And Jefferson looked on the "tyranny of the legislatures" as "the most formidable dread at present, and will be for long years." [8] Therefore the Framers refused to adopt the *lex parliamenti*, which would have allowed Congressmen and their servants to enjoy numerous im-

Wiseke, The History of English Parliamentary Privilege 39–47 (1921); Tasswell-Langmead, English Constitutional History 589 (11th ed., Plucknett, 1960). The abuse of the privilege lay as much in its arbitrary contraction as extension. In 1763 the House of Commons reacted angrily to a tract written by one of its own members, John Wilkes, and withdrew the privilege from him in order to permit his prosecution for seditious libel. The House also expelled Wilkes, and he fled to France as an outlaw. Upon his return to England in 1768, he was re-elected to Parliament, again expelled, tried for seditious libel, and sentenced to 22 months imprisonment. The House refused to seat him on three further occasions, and it was not until 1782 that the resolutions expelling Wilkes and declaring him incapable of re-election were expunged from the records of the House. Tasswell-Langmead, *supra*, at 584–585; *Powell* v. *McCormack*, 395 U. S. 486, 527–528 (1969).

[6] Clarke, Parliamentary Privilege in the American Colonies 99 (1943).

[7] The Federalist No. 48.

[8] *Tenney* v. *Brandhove*, 341 U. S. 367, 375 n. 4 (1951).

munities from ordinary legal restraints. But it does not follow that the Framers went further and authorized Congress to transfer discipline of bribe takers to the Judicial Branch. The Government refers us to nothing in the Convention debates or in writings of the Framers that even remotely supports the argument. Indeed there is much in the history of the Clause to point the other way, toward a personalized legislative privilege not subject to defeasance even by a specific congressional delegation to the courts.

The *Johnson* opinion details the history. The Clause was formulated by the Convention's Committee on Style, which phrased it by revising Article V of the Articles of Confederation which had provided: "Freedom of speech and debate in Congress shall not be impeached or questioned *in any court*, or place out of Congress." (Emphasis supplied.) This wording derived in turn from the provision of the English Bill of Rights of 1689 that "Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned *in any Court or Place out of Parliament*." (Emphasis supplied.) The same wording, or variations of it, appeared in state constitutions. Article VIII of the Maryland Declaration of Rights (1776) declared that legislative freedom "ought not to be impeached or questioned in any other court or judicature." The Massachusetts Bill of Rights (Article XXI, 1780) provided that the "freedom of deliberation, speech and debate, in either house of the legislature, is so essential to the rights of the people, that it cannot be the foundation of any accusation or prosecution, action, or complaint, in any other court or place whatsoever." The New Hampshire Constitution (Article XXX, 1784) contained a provision virtually identical to Massachusetts'. In short "[f]reedom of speech and action in the legislature was taken as a mat-

ter of course by those who severed the Colonies from the Crown and founded our Nation." *Tenney* v. *Brandhove*, 341 U. S., at 372.

Despite his fear of "legislative excess," *Tenney* v. *Brandhove*, *supra*, at 375, Jefferson, when confronted with criticism of certain Congressmen by the Richmond, Virginia, grand jury, said:

> "[T]hat in order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive." 8 The Works of Thomas Jefferson 322 (Ford ed. 1904).

Jefferson's point of view was shared by his contemporaries[6] and found judicial expression as early as 1808, in the *Coffin* opinion, *supra*. It was there stated:

> "In considering this article, it appears to me that the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, *even against the declared will of the house*. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches

[6] James Wilson, a member of the Convention committee responsible for the Clause, stated: "In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensibly necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." 1 The Works of James Wilson 421 (McCloskey ed. 1967).

> of the legislature. In this respect the privilege here secured resembles other privileges attached to each member by another part of the constitution, by which he is exempted from arrests on *mesne* (or original) process, during his going to, returning from, or attending the general court. Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature." 4 Mass., at 27. (Emphasis supplied.)

In short, if the Framers contemplated judicial inquiry into legislative acts, even on the specific authorization of Congress, that intent is not reflected in the language of the Speech or Debate Clause or contemporary understanding of legislative privilege. History certainly shows that the Framers feared unbridled legislative power. That fact, however, yields no basis for an interpretation that in Article I, §§ 1 and 8, the Framers authorized Congress to ignore the prohibition against inquiry in "any other place" and enact a statute either of general application or specifically providing for a trial in the courts of a member who takes a bribe for conduct related to legislative acts.[10]

III

I yield nothing to the Court in conviction that this reprehensible and outrageous conduct, if committed by

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[10] While it is true that Congress has made the acceptance of a bribe a crime ever since 1853, it should be noted that the earliest federal bribery statute, passed by Congress in 1790, applied only to judges who took bribes in exchange for an "opinion, judgment or decree." Act of April 30, 1790, 1 Stat. 112, 117. It also appears that the common law did not recognize the charge of bribe-taking by a legislator. Blackstone, for example, defined bribery as "when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behaviour in his office." 4 Blackstone's Commentaries, 139. Coke also regarded bribery as a crime committed by judges. Coke, 3d Inst., 145.

the Senator, should not have gone unpunished." But whether a court or only the Senate might undertake the task is a constitutional issue of portentous significance, which must of course be resolved uninfluenced by the magnitude of the perfidy alleged. It is no answer that Congress assigned the task to the judiciary in enacting 18 U. S. C. § 201. Our duty is to Nation and Constitution, not Congress. We are guilty of a grave disservice to both Nation and Constitution when we permit Congress to shirk its responsibility in favor of the courts. The Framers' judgment was that the American people could have a Congress of independence and integrity only if alleged misbehavior in the performance of legislative functions was accountable solely to a member's own House and never to the executive or judiciary. The passing years have amply justified the wisdom of that judgment. It is the Court's duty to enforce the letter of the Speech or Debate Clause in that spirit. We did so in deciding *Johnson*. In turning its back on that decision today, the Court arrogates to the judiciary an authority committed by the Constitution, in Senator Brewster's case, exclusively to the Senate of the United States. Yet the Court provides no principled justification, and I can think of none, for its denial that *United States* v. *Johnson* compels affirmance of the District Court. That decision is only six years old and bears the indelible imprint of the distinguished constitutional scholar who wrote the opinion for the Court. *Johnson* surely merited a longer life.

SUPREME COURT OF THE UNITED STATES

No. 70-45

United States, Appellant, v. Daniel B. Brewster. | On Appeal from the United States District Court for the District of Columbia Circuit.

[June 29, 1972]

MR. JUSTICE WHITE, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

The question presented by this case is not whether bribery or other offensive conduct on the part of Members of Congress must or should go unpunished. No one suggests that the Speech or Debate Clause insulates Senators and Congressmen from accountability for their misdeeds. Indeed, the clause itself is but one of several constitutional provisions which makes clear that Congress has broad powers to try and punish its Members:

> "the Constitution expressly empowers each House to punish its own members for disorderly behavior. We see no reason to doubt that this punishment may in a proper case be imprisonment, and that it may be for refusal to obey some rule on that subject made by the House for the preservation of order.
>
> "So, also, the penalty which each House is authorized to inflict in order to compel the attendance of absent members may be imprisonment, and this may be for a violation of some order or standing rule on that subject.
>
> "Each House is by the Constitution made the judge of the election and qualification of its members. In deciding on these it has an undoubted right to examine witnesses and inspect papers, subject to the usual rights of witnesses in such cases;

> and it may be that a witness would be subject to like punishment at the hands of the body engaged in trying a contested election, for refusing to testify that he would if the case were pending before a court of judicature.
>
> "The House of Representatives has the sole right to impeach officers of the government, and the Senate to try them. Where the question of such impeachment is before either body acting in its appropriate sphere on that subject, we see no reason to doubt the right to compel the attendance of witnesses, and their answer to proper questions, in the same manner and by the use of the same means that courts of justice can in like cases." *Kilbourn* v. *Thompson*, 103 U. S. 168, 189–190 (1881).

The sole issue here is in what forum the accounting must take place—whether the prosecution which the Government proposes is consistent with the command that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place." U. S. Constitution, Art. I, § 6, cl. 2.

The majority disposes of this issue by distinguishing between promise and performance. Even if a Senator or Congressman may not be prosecuted for a corrupt legislative act, the Speech or Debate Clause does not prohibit prosecution for a corrupt promise to perform that act. If a Member of Congress promises to vote for or against a bill in return for money, casts his vote in accordance with the promise and accepts payment, the majority's view is that even though he may not be prosecuted for voting as he did, although the vote was corrupt, the executive may prosecute and the judiciary may try him for the corrupt agreement or for taking the money either under a narrowly drawn statute or one of general application. This distinction between a promise

and an act will not withstand scrutiny in terms of the values which the Speech or Debate Clause was designed to secure.

The majority agrees that in order to assure the independence and integrity of the legislature and to reinforce the separation of powers so deliberately established by the founders, the Speech or Debate Clause prevents a legislative act from being the basis of criminal or civil liability. Concededly, a Member of Congress may not be prosecuted or sued *for* making a speech or voting in committee or on the floor, whether he was paid to do so or not. The majority also appears to embrace the holding in *United States* v. *Johnson*, 383 U. S. 169 (1966), that a Member of Congress could not be convicted of a conspiracy to defraud the Government where the purposes or motives underlying his conduct as a legislator are called into question. If one follows the mode of the majority's present analysis, the prosecution in *Johnson* was not for speaking, voting or performing any other legislative act in a particular manner; the criminal act charged was a conspiracy to defraud the United States anterior to any legislative performance. To prove the crime, however, the prosecution introduced evidence that money was paid to make a speech, among other things, and that the speech was made. This, the Court held, violated the Speech or Debate Clause, because it called into question the motives and purposes underlying Congressman Johnson's performance of his legislative duties.

The same infirmity inheres in the present indictment, which was founded upon two separate statutes. 18 U. S. C. § 201 (g) requires proof of a defendant's receipt or an agreement or attempt to receive anything of value "for or because of any official act performed, or to be performed, by him . . . ." Of course, not all, or even many, official acts would be legislative acts protected by the Speech or Debate Clause; but whatever the act, the

Government must identify it to prove its case. Here we are left in no doubt whatsoever, for the official acts expressly charged in the indictment were in respect to "his action, vote and decision on postal rate legislation." Similarly, there is no basis for arguing that the indictment did not contemplate proof of performance of the act, for the indictment in so many words charged the arrangement was "for and because of official acts *performed* by him in respect to his action, vote and decision on postal rate legislation which *had been pending* before him in his official capacity." (Emphasis added.) It is this indictment, not some other charge, that was challenged and dismissed by the District Court. Like that court I would take the Government at its word: it alleged and intended to prove facts that questioned and impugned the motives and purposes underlying specified legislative acts of the Senator and intended to use these facts as a basis for the conviction of the Senator himself. Thus, taking the charge at face value, the indictment represents an attempt to prosecute and convict a Member of Congress not only for taking money but *for* performing a legislative act. Moreover, whatever the proof might be, the indictment on its face charged a corrupt undertaking with respect to the performance of legislative conduct that had already occurred and so, without more, "questioned in [some] other Place" the speech and debate of a Member of Congress. Such a charge is precisely the kind that the Senator should not have been called upon to answer if the Speech or Debate Clause is to fulfill its stated purpose.

Insofar as it charged crimes under 18 U. S. C. § 201 (c)(1), the indictment fares little better. That section requires proof of a corrupt arrangement for the receipt of money and also proof that the arrangement was in return for the defendant "being influenced in his performance of any official act . . . ." Whatever the official act may prove

to be, the Government cannot prove its case without calling into question the motives of the Member in performing that act, for it must prove that the Member undertook for money to be influenced in that performance. Clearly, if the Government sought to prove its case against a Member of Congress by evidence of a legislative act, conviction could not survive in the face of the holding in *Johnson*. But even if an offense under the statute could be established merely by proof of an undertaking to cast a vote, which is not alleged in the indictment or shown at trial to have taken place one way or the other, the motives of the legislator in performing his duties with respect to the subject matter of the undertaking would nevertheless inevitably be impugned. In charging the offense under § 201 (*d*)(1), the indictment alleged a corrupt arrangement made "in return for being influenced in his performance of official acts in respect to his action, vote and decision on postal legislation which might at any time be pending before him in his official capacity." Again, I would take the Government at its word: it charged and intended to prove facts that could not fail to impugn Senator Brewster's performance of his legislative duties.*

The use of criminal charges "against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege." *United States* v. *Johnson*, 383 U. S. 169, 182 (1966), and in applying the privilege "we look

*In *Gravel* v. *United States*, *ante*, at —, it is held that the Speech or Debate Clause does not immunize criminal acts performed in preparation for or execution of a legislative act. But the unprotected acts referred to there were criminal in themselves, provable without reference to a legislative act and without putting the defendant member to the task of defending the integrity of his legislative performance. Here, as stated, the crime charged necessarily implicates the Member's legislative duties.

particularly to the prophylactic purposes of the clause." *Ibid.* Let us suppose that the Executive Branch is informed that private interests are paying a Member of Congress to oppose administration-sponsored legislation. The Congressman is chairman of a key committee where a vote is pending. A representative from the Executive department informs the Congressman of the allegations against him, hopes the charges are not true and expresses confidence that the committee will report the bill and that the Member will support it on the floor. The pressure on the Congressmen, corrupt or not, is undeniable. He will clearly fare better in any future criminal prosecution if he answers the charge of corruption with evidence that he voted contrary to the alleged bargain. Even more compelling is the likelihood that he will not be prosecuted at all if he follows the administration's suggestion and supports the bill. Putting aside the potential for abuse in ill-conceived, mistaken or false accusations, the Speech or Debate Clause was designed to prevent just such an exercise of Executive power. It is no answer to maintain that the potential for abuse does not inhere in a prosecution for a completed bribery transaction where the legislative act has already occurred. A corrupt vote may not be made the object of a criminal prosecution because otherwise the Executive would be armed with power to control the vote in question, if forewarned, or in any event to control other legislative conduct.

All of this comes to naught if the executive may prosecute for a promise to vote though not for the vote itself. The same hazards to legislative independence inhere in the two prosecutions. Bribery is most often carried out by prearrangement; if that part of the transaction may be plucked from its context and made the basis of criminal charges, the Speech or Debate Clause loses its force. It will be small comfort for a Congressman to know that he cannot be prosecuted for his vote,

whatever it may be, but he can be prosecuted for an alleged agreement even if he votes contrary to the asserted bargain.

The realities of the American political system, of which the majority fails to take account, render particularly illusory a Speech or Debate Clause distinction between a promise to perform a legislative act and the act itself. Ours is a representative government. Candidates for office engage in heated contests and the victor is he who receives the greatest number of votes from his constituents. These campaigns are run on platforms which include statements of intention and undertakings to promote certain policies. These promises are geared, at least in part, to the interests of the Congressman's constituency. Members of Congress may be legally free from dictation by the voters; but there is a residual conviction that they should have due regard for the interests of their States or districts, if only because on election day a Member is answerable for his conduct.

Serving constituents is a crucial part of a legislator's ongoing duties. Congressmen receive a constant stream of complaints and requests for help or service. Judged by the volume and content of a Congressman's mail, the right to petition is neither theoretical nor ignored. It has never been thought unethical for a Member of Congress whose performance on the job may determine the success of his next campaign not only to listen to the petitions of interest groups in his State or district, which may come from every conceivable group of people, but also to support or oppose legislation serving or threatening those interests.

Against this background a second fact of American political life assumes considerable importance for the purposes of this case. Congressional campaigns are most often financed with contributions from those interested

in supporting particular Congressmen and their policies. A legislator must maintain a working relationship with his constituents not only to garner votes to maintain his office but to generate financial support for his campaigns. He must also keep in mind the potential effect of his conduct upon those from whom he has received financial support in the past and those whose help he expects or hopes to have in the next campaign. An expectation or hope of future assistance can arise because constituents have indicated that support will be forthcoming if the Member of Congress champions their point of view. Financial support may also arrive later from those who approve of a Congressman's conduct and have an expectation it will continue. Thus, mutuality of support between legislator and constituent is inevitable. Constituent contributions to a Congressman and his support of constituent interests will repeatedly coincide in time or closely follow one another. It will be the rare Congressman who never accepts campaign contributions from persons or interests whose view he has supported, or will support, by speech making, voting or bargaining with fellow legislators.

All of this, or most of it, may be wholly within the law and consistent with contemporary standards of political ethics. Nevertheless, the opportunities for an executive, in whose sole discretion the decision to prosecute rests under the statute before us, to claim that legislative conduct has been sold are obvious and undeniable. These opportunities, inherent in the political process as it now exists, create an enormous potential for executive control of legislative behavior by threats or suggestions of criminal prosecution—precisely the evil which the Speech or Debate Clause was designed to prevent.

Neither the majority opinion nor the statute under which Brewster is charged distinguishes between campaign contributions and payments designed for or put

to personal use. To arm the executive with the power to prosecute for taking political contributions in return for an agreement to introduce or support particular legislation or policies is to vest enormous leverage in the executive and the courts. Members of Congress may find themselves in the dilemma of being forced to conduct themselves contrary to the interests of those who provide financial support or declining that support. They may also feel constrained to listen less often to the entreaties and demands of potential contributors. The threat of prosecution for supposed missteps which are difficult to define and fall close to the line of what ordinarily is considered permissible, even necessary, conduct scarcely ensures that legislative independence which is the root of the Speech and Debate Clause.

Even if the statute and this indictment were deemed limited to payments clearly destined for or actually put to personal use in exchange for a promise to perform a legislative act, the Speech and Debate Clause would still be offended. The potential for executive harassment is not diminished merely because the conduct made criminal is more clearly defined. A Member of Congress becomes vulnerable to abuse each time he makes a promise to a constituent on a matter over which he has some degree of legislative power, and the possibility of harassment can inhibit his exercise of power as well as his relations with constituents. In addition, such a prosecution presents the difficulty of defining when money obtained by a legislator is destined for or has been put to personal use. For the legislator who uses both personal funds and campaign contributions to maintain himself in office the choice of which to draw upon may have more to do with bookkeeping than bribery yet any interchange of funds would certainly render his conduct suspect. Even those Members of Congress who keep separate accounts for campaign contributions but retain

unrestricted drawing rights would remain open to a charge that the money was in fact for personal use. In both cases the possibility of a bribery prosecution presents the problem of determining exactly those purposes for which campaign contributions can legitimately be used. The difficulty of drawing workable lines enhances the prospects for Executive control and correspondingly diminishes congressional freedom of action.

The majority does not deny the potential for executive control which inheres in sanctioning this prosecution. Instead, it purports to define the problem away by asserting that the Speech or Debate Clause reaches only prosecutions for legislative conduct and that a promise to vote for a bill, as distinguished from the vote itself, does not amount to a legislative act. The implication is that a prosecution based upon a corrupt promise no more offends the Speech or Debate Clause than the prosecution of a Congressman for assault, robbery or murder. The power to prosecute may threaten legislative independence but the Constitution does not for that reason forbid it. I find this unpersuasive.

The fact that the executive may prosecute members of Congress for ordinary criminal conduct, which surely it can despite the potential for influencing legislative conduct, cannot itself demonstrate that prosecutions for corrupt promises to perform legislative acts would be equally constitutional. The argument proves too much, for it would as surely authorize prosecutions for the legislative act itself. Moreover, there is a fundamental difference in terms of potential abuse between prosecutions for ordinary crime and those based upon a promise to perform a legislative act. Even the most vocal detractor of Congress could not accurately maintain that the executive would often have credible basis for accusing a member of Congress of murder, theft, rape or other such crimes. But the prospects for asserting an argu-

ably valid claim are far wider in scope for an executive prone to fish in legislative waters and to search for correlations between legislative performance and financial support. The possibilities are indeed endless, as is the potential for abuse.

The majority ignores another vital difference between executive authority to prosecute for ordinary crime and the power to challenge undertakings or conspiracies to corrupt the legislative process. In a prosecution for drunken driving or assault, the manner in which a Congressman performed his legislative tasks is quite irrelevant to either prosecution or defense. In the trial of a Congressman for making a corrupt promise to vote, on the other hand, proof that his vote was in fact contrary to the terms of the alleged bargain will make a strong defense. Cf. *United States* v. *Johnson*, 383 U. S. 169, 176–177 (1966). A Congressman who knows he is under investigation for a corrupt undertaking will be well advised to conduct his affairs in a manner wholly at odds with the theory of the charge which may be lodged against him. As a practical matter, to prosecute a Congressman for agreeing to accept money in exchange for a promise to perform a legislative act inherently implicates legislative conduct. And to divine a distinction between promise and performance is wholly at odds with protecting that legislative independence which is the heart of the Speech and Debate Clause.

Congress itself clearly did not make the distinction which the majority finds dispositive. The statute before us is a comprehensive effort to sanitize the legislative environment. It expressly permits prosecutions of members of Congress for voting or promising to vote in exchange for money. The statute does not concern itself with murder or other undertakings unrelated to the legislative process. Congress no doubt believed it consistent with the Speech or Debate Clause to authorize execu-

tive prosecutions for corrupt voting. Equally obvious is the fact that Congress drew no distinction in legislative terms between prosecutions based upon voting and those based upon motivations underlying legislative conduct.

The arguments which the majority now embraces were the very contentions which the Government made in *United States* v. *Johnson*, 383 U. S. 169 (1966). In rejecting those arguments on the facts of that case, where legislative conduct as well as a prior conspiracy formed a major part of the Government's proof, the Court referred with approval to *Ex parte Wason*, [1869] 4 Q. B. 573, in which the question was whether members of the House of Lords could be prosecuted for a conspiracy to prevent presentation of a petition on the floor of Lords. Johnson, *id.*, at 183, sets out the reaction of the English court:

> "The court denied the motion, stating that statements made in the House 'could not be made the foundation of civil or criminal proceedings . . . . And a conspiracy to make such statements would not make the person guilty of it amenable to the criminal law.' *Id.*, at 576 (Cockburn, C. J.). Mr. Justice Lush added, 'I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.' *Id.*, at 577."

The *Wason* court clearly refused to distinguish between promise and performance; the legislative privilege applied to both. Mr. Justice Harlan, writing for the Court in *Johnson*, took no issue with this position. Indeed, he indicated that the Speech or Debate Clause barred any prosecution under a general statute where there is

drawn in question "the legislative acts of . . . the member of Congress *or his motives for performing them.*" 383 U. S., at 185 (emphasis added). I find it difficult to believe that under the statute there involved the *Johnson* Court would have permitted a prosecution based upon a promise to perform a legislative act.

Because it gives a begrudging interpretation to the clause, the majority finds it can avoid dealing with the position upon which the Government placed principal reliance in its brief in this Court. *Johnson* put aside the question whether an otherwise impermissible prosecution conducted pursuant to a statute such as we now have before us—a statute specifically including congressional conduct and purporting to be an exercise of congressional power to discipline its Members—would be consistent with the Speech or Debate Clause. As must be apparent from what so far has been said, I am convinced that such a statute contravenes the letter and purpose of the Clause. True, Congress itself has defined the crime and specifically delegated to the executive the discretion to prosecute and to the courts the power to try. Nonetheless, I fail to understand how a majority of Congress can bind an objecting Congressman to a course so clearly at odds with the constitutional command that legislative conduct shall be subject to question in no place other than the Senate or House of Representatives. The Speech or Debate Clause is an allocation of power. It authorizes Congress to call offending members to account in their appropriate Houses. A statute which represents an abdication of that power is in my view impermissible.

I return to the beginning. The Speech or Debate Clause does not immunize corrupt Congressmen. It reserves the power to discipline in the Houses of Congress. I would insist that those Houses develop their own institutions and procedures for dealing with those in their midst who would prostitute the legislative process.